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No. ———

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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PATRICK A. HERRING, JR., *et al.*,
*Petitioners,*

v.

DELTA AIR LINES INC. and
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. When the surviving carrier in an airline merger promises to arbitrate merger-related labor disputes in a merger contract, is that promise enforceable under the Railway Labor Act by the affected employees, particularly where the challenged action is tainted by threats, intimidation, coercion, and breach of the duty of fair representation?

2. When the surviving carrier in an airline merger promises to arbitrate merger-related labor disputes in a merger contract, is that promise enforceable under the Federal Arbitration Act by the affected employees, or is it excluded from enforcement because it is a "contract of employment"?

## LIST OF PARTIES

The petitioners are Patrick A. Herring, Jr., and the other 660 pilots listed in the Appendix at 27a.

The respondents are Delta Air Lines, Inc. and the Air Line Pilots Association, International.

The parties to the proceeding below are petitioners and respondents in this Court.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners Patrick A. Herring, Jr., *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on October 13, 1989.

## OPINIONS BELOW

The unpublished memorandum of the Court of Appeals for the Ninth Circuit, entered October 13, 1989, is reprinted in the Appendix at 1a.

The unreported memorandum of decision and order of the United States District Court for the Central District of California (Kelleher, D.J.), entered May 12, 1988, is reprinted in the Appendix at 9a.

## JURISDICTION

The memorandum of the Court of Appeals for the Ninth Circuit affirming the judgments of the district court was entered on October 13, 1989. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Railway Labor Act, 45 U.S.C. §§ 151a, 152 First; Federal Arbitration Act, 9 U.S.C. §§ 1, 2, 4. The text of the statutory sections is set forth in the Appendix, 21a-24a.

## STATEMENT OF THE CASE

Petitioners are the majority of the former Western Air Lines, Inc. ("Western") pilots who are now employed by Delta Air Lines, Inc. ("Delta") as a result of a merger between the two companies. They seek to enforce a promise made by Delta to arbitrate labor disputes arising from the merger. Plaintiffs seek arbitration of their claim that the Western and Delta pilot seniority lists were integrated in an unfair and inequitable manner, both as to the list integration process and as to the product of that process. Petitioners do not seek to have the federal courts adjudicate the merits of the seniority list integration dispute, but seek the courts' assistance only to enforce Delta's promise to arbitrate the dispute.

On September 9, 1986, Western and Delta entered into an agreement and plan of merger which required that Delta provide Labor Protective Provisions ("LPPs") which were no less favorable than the LPPs ordered by the Civil Aeronautics Board in previous airline mergers. In general, such LPPs provide monetary allowances to employees adversely affected by the transaction, the equitable integration of seniority lists, and binding arbitration of disputes relating to the LPPs. Section 3 of the LPPs requires that the seniority lists be integrated "in a fair and equitable manner" (A.25a). Section 13 of the LPPs

provides that "any dispute or controversy . . . with respect to the protections provided herein . . . may be referred by any party to an arbitrator. . . ." *Id.*

Upon stockholder approval of the Delta/Western merger in December 1986, the Western and Delta pilot merger committees began negotiations to arrive at an integrated seniority list to be jointly presented to Delta. Since both pilot groups were represented by the Air Line Pilots Association ("ALPA"), the negotiations were subject to the provisions of ALPA Merger Policy. This process involves only the two pilot groups whose merger representatives have authority to deal only with each other and do not have authority to engage in negotiations with the carrier. Although the ALPA Merger Policy process can result in ALPA arbitration between the two pilot groups, that is separate from LPP arbitration. Arbitration under the LPPs occurs if the carrier refuses to accept the joint list or if there is a dispute over the integrated list.

Delta's interference in these internal ALPA negotiations began almost immediately. Delta management repeatedly insisted that the seniority list be put together on a timetable far more accelerated than set forth in the ALPA Merger Policy. At the same time, Delta management insisted upon specified "parameters" for the list which precluded negotiation of the proposals presented by the Western pilot merger representatives. Ultimately, Delta mandated that the list be put together on the basis of "a ratio by equipment category and seat"—precisely the method of integration advanced by the Delta pilots. Delta management increased its pressure upon the former Western pilots by repeatedly stating, contrary to its promises in the LPPs, that it opposed arbitration and would not accept an arbitrated decision it did not like.

Delta's interference in the internal ALPA negotiations culminated in a meeting at Delta headquarters in Atlanta that was characterized by Delta's current Chairman as a

"showdown meeting." This May 19, 1987 meeting occurred just after the Western pilot merger representatives had declared an "impasse" in negotiations with the Delta pilots. At the May 19 meeting, Delta's then Chairman presented an ultimatum. Delta gave the pilots just ten days to finalize the list. If not done, Delta threatened to take a number of actions adverse to the Western pilots, including the furlough of one third of the Western pilot workforce, costing more than 300 pilots their jobs.

Delta's furlough threats against the Western pilots were unprecedented in the industry since furloughs typically result from reduced flying needs, with pilots systemwide being given the opportunity to "bump" pilots of less seniority. Also, it was unprecedented for a carrier to propose furlough from only a targeted segment of its workforce. Delta's motives against the former Western pilots were underscored by its own prior longstanding policy against furloughs.

On May 28, 1987, one day before Delta management's deadline expired, the Western representatives capitulated and signed a seniority list with the Delta pilots which was nearly identical to the list mandated by Delta management. While the list was also signed by Delta management, it was not made part of the collective bargaining agreement since the merger representatives were not authorized to bargain with Delta. The list was incorporated into a collective bargaining agreement several months later, after plaintiffs filed suit requesting arbitration under the LPPs.

During the 5-month period of coercion and intimidation against the Western pilots, ALPA repeatedly failed to enforce its own Merger Policy or to intervene with Delta on the pilots' behalf to assure that the ALPA policy would be enforced. ALPA made no attempt to rebuff Delta's totally unrealistic timetables for the integration process which were three to seven months more accelerated than the schedule in ALPA's Merger Policy. When the West-

ern pilot committee advised the President of ALPA (himself a Delta pilot) of an "impasse" in the seniority negotiations and requested the services of a mediator under the ALPA Merger Policy, the President never responded.

The effect of Delta's coercion and ALPA's failure to enforce its Merger Policy was devastating to the Western pilots. A pilot's place on the seniority list is the most critical factor in his career. It affects his assigned base, his position in the cockpit, the equipment he can fly, the routes on which he can work, his compensation, and his pension. Under the May 28 list, former Western pilots fell below pre-merger Delta pilots who were hired many years later and have substantially fewer years of service. Near the bottom of the list, former Western pilots with as many as five years of active service were placed on the list below Delta probationary pilots who, at the time the merger was announced, had never held a line assignment with Delta or even qualified on any of Delta's airplanes. Even though the premerger Western/Delta pilot ratio was approximately 1 to 3, former Western pilots occupy just 95 of the top 600 positions on the May 28 list. Over time, the situation worsens. In a projection by plaintiffs of the May 28 list to the year 2005, former Western pilots will occupy just 5 of the top 600 positions, whereas under a date of hire list, they would occupy 189 of the top 600 positions.

In June, 1987, in accordance with sections 3 and 13 of the LPPs, plaintiffs protested the integrated seniority list. They claimed that the list and the process used to integrate the list were not fair and equitable as required by the LPPs. They sought reformation of the list, and failing that, arbitration under the LPPs. Delta and ALPA refused to reform the list. Plaintiffs then requested that the National Mediation Board provide seven names from which an arbitrator could be selected. When the Board furnished the requested names, both ALPA and Delta refused to participate in the selection process and the arbitration.

In August, 1987 plaintiffs filed suit in the U.S. District Court for the Central District of California to enforce Delta's promise to arbitrate merger-related labor disputes under the LPPs. Subject matter jurisdiction was conferred by 28 U.S.C. §§ 1331, 1332, 1337, 2201. Plaintiffs sought to enforce the arbitration promise under the Railway Labor Act, the Federal Arbitration Act, and common law contract. Plaintiffs also asserted claims against ALPA for breach of its duty of fair representation, *inter alia*, because of its failure to comply with its own Merger Policy.

On May 12, 1988, the district court granted summary judgment in favor of defendants Delta and ALPA (A. 9a). The court declared that neither the Railway Labor Act, nor the Federal Arbitration Act, nor the LPPs provided plaintiffs with arbitration rights. The district court denied plaintiffs' Railway Labor Act claims on the theory that the Act's duty to maintain agreements and to arbitrate arises only with respect to disputes under collective bargaining agreements and that the dispute did not involve interpretation of a collective bargaining agreement. Paradoxically, the court rejected plaintiffs' Federal Arbitration Act claim because it found the dispute concerned a collective bargaining agreement claim and thus fell within the Act's "contract of employment" exception.

The district court rejected plaintiffs' showing that, even in the presence of a union agreement, LPP arbitration rights may be enforced if the disputed seniority list was arrived at in bad faith, in a deliberate attempt to subvert the LPP requirements, or in other compelling circumstances. The court disregarded plaintiffs' claims of Delta's bad faith by stating that the coercion, intimidation and threats by Delta were acceptable collective bargaining practices. The court ignored plaintiffs' contentions that the coercion occurred during internal ALPA negotiations and that the merger representatives did not and could not bargain with Delta on the issue because

they were authorized to bargain only with each other—not with the carrier. The district court, without any discussion of the facts, also granted summary judgment on the unfair representation claim on the ground that ALPA acted reasonably. The district court denied all other motions, including the motion to join additional plaintiffs in the action.

Plaintiffs appealed to the Ninth Circuit. In a 7-page unpublished opinion, the appeals court also declined to enforce Delta's promise to arbitrate (A.1a). It determined that plaintiffs could not enforce the promise under the Railway Labor Act, 45 U.S.C. §§ 151a and 152 First and Second, because it limited those sections to be applicable to disputes which arise out of collective bargaining agreements. It also declined to enforce Delta's arbitration promise under the Federal Arbitration Act because Delta's promise in the merger agreement was not "a written agreement between the parties to arbitrate," and if it were, it would be excluded from FAA coverage because it was "a contract of employment." It did not address the LPP precedent which authorizes arbitration in the event of bad faith, and it also did not address plaintiffs' claims that the seniority list was a product of Delta's bad faith, coercion and intimidation.

## REASONS FOR GRANTING THE WRIT

### I. THE ISSUE OF WHETHER EMPLOYEES IN THE AIRLINE INDUSTRY MAY ENFORCE AN EMPLOYER'S PROMISE TO ARBITRATE MERGER-RELATED LABOR DISPUTES IS AN IMPORTANT QUESTION OF FEDERAL LAW SINCE REGULATORY AGENCIES NO LONGER IMPOSE OR ENFORCE ARBITRATION REQUIREMENTS

The decision of the lower court, if unreviewed, will thwart the strong federal policy of enforcing agreements to arbitrate. The importance of this policy favoring arbitration was recently reaffirmed by this Court in the area of pensions, *Shearson Lehman/American Express v.*

*Bird*, 110 S.Ct. 225 (1989), and securities transactions, *Rodriguez De Quijas v. Shearson/American Exp., Inc.*, 109 S.Ct. 1917 (1989). The Court should now enforce this policy in the context of national transportation and airline mergers.

The national policy in favor of arbitration is equally strong under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-163, 181-188, and under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-13. In the labor law context, this Court has stated:

> [a]n order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

*AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986), *quoting United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).

Similarly, the FAA "establishes a 'federal policy favoring arbitration' . . . requiring that '[courts] rigorously enforce agreements to arbitrate'." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 2337, *reh'g denied*, 483 U.S. 1056 (1987), *quoting Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983), and *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). Under the FAA, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . ." *Moses H. Cone*, 460 U.S. at 24-25.

The lower court's decision has created a large loophole in the federal arbitration scheme where an employee's promise to arbitrate airline merger-related labor disputes is not enforceable under either the RLA or the FAA. This loophole is of national significance because such

promises to arbitrate have replaced arbitration orders which, until recently, were imposed and enforced by the federal agencies regulating the airline industry.

The result of the lower court's loophole is much more severe than in *Rodriquez* or *Bird* where the choice was whether the dispute should be resolved through arbitration or formal court procedures. Here, as a result of the lower court's erroneous interpretation of the RLA and FAA, the labor dispute arising under the merger will not be resolved at all by any impartial tribunal. This consequence is directly contrary to national labor policy in general and to national transportation policy in particular, where the peaceful and prompt resolution of labor issues has been declared to be in the national interest.

For almost four decades, the Civil Aeronautics Board ("CAB"), following the practice in the railroad industry dating back to the 1930s, recognized that the merger of air carriers is likely to cause labor disputes which could cripple the surviving carrier's transportation capacity and be detrimental to the national interest. Accordingly, in approving airline mergers, the CAB imposed Labor Protective Provisions ("LPPs") upon the surviving carrier.[1] The form of LPPs became standardized, along the lines of the *Allegheny-Mohawk*[2] LPPs used in the Western/Delta merger.

These LPPs gave the employees certain rights with respect to transfers, moving allowances and seniority, which are issues inherent in transportation mergers. Among the rights provided was the right to arbitrate any dispute arising under the LPPs. The purpose of the LPP arbitration requirement was to resolve labor dis-

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[1] The history of the CAB's imposition of LPPs in airline mergers is recounted in *United-Capital Merger Case*, 33 C.A.B. 307, 323 n.71 (1961).

[2] *Allegheny-Mohawk Merger Case*, 59 C.A.B. 19 (1972).

putes in a prompt, economical, and adequate fashion and thereby to protect interstate commerce. These are the same goals of the RLA and FAA.[3]

In the 1980s, the federal government changed its policy and declined to impose LPPs upon the merging carriers as a matter of course. *See ALPA v. Department of Transportation*, 838 F.2d 563, 565 (D.C. Cir. 1988). Instead, as in the Delta/Western merger at issue here, the Department of Transportation ("DOT"), successor to the CAB for these purposes, relied upon the adoption of the LPPs by carriers involved. As of January 1, 1989, DOT's authority over airline mergers expired altogether, *see* 49 U.S.C. App. § 1551(a)(7), and the legal underpinning for the issuance of LPPs expired with it.

Before this change in federal policy, enforcement of the arbitration provisions in the LPPs was accomplished in the first instance by petitions to the federal agency which imposed the LPPs. Now, affected employees can seek to enforce their arbitration rights only in federal district court. By refusing to enforce the LPP arbitration clause under the FAA or the RLA, the lower court's decision effectively leaves employees without a remedy to enforce arbitration rights if the employer reneges on its arbitration promise, as Delta did here. Because the issue of the arbitrability of airline merger seniority disputes under LPPs is an important question of federal law that will recur in other airline mergers, this Court should grant the petition for certiorari.

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[3] Courts have noted that the enforcement of LPPs, and particularly the LPP dispute resolution mechanism leading to arbitration, employed labor law principles developed under the RLA. *See Delta Air Lines, Inc. v. CAB*, 574 F.2d 546, 550-51 (D.C. Cir.), *cert. denied*, 439 U.S. 819 (1978); *Pan American World Airways, Inc. v. CAB*, 683 F.2d 554, 559 (D.C. Cir. 1982).

## II. THE ARBITRATION OF LPP DISPUTES UNDER THE RLA PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT WARRANTS REVIEW BY THE COURT

In order to close the loophole opened by the court below, the Court should review the enforceability of an employer's arbitration promise under the RLA. The promise made by Delta here was the same Section 13 LPP formulation formerly imposed by the regulatory agencies that "any dispute or controversy . . . with respect to the protections provided herein . . . may be referred by any party to an arbitrator" (A.25a). The court below refused to honor this promise because, in its view, the RLA is applicable only to resolve disputes between unions and employers which arise out of collective bargaining agreements. It found no such disputes and, therefore, refused to apply the RLA to permit individual employees to enforce Delta's arbitration promise.

*First*, the court below extinguished the RLA right to arbitrate "any dispute" under the LPPs, including disputes raised by employees or groups of employees other than unions (A.3a-4a). In *Allegheny-Mohawk*, 59 C.A.B. at 33, the CAB emphasized that under Section 13 a party "has the unqualified right to demand arbitration of any bona fide dispute of a nonfrivolous nature. . . ."[4]

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[4] *See Flying Tiger-Slick Merger Case*, 18 C.A.B. 326, 347 (1954) ("the arbitration provision provided by the Board in its labor protective clauses should be used to settle any dispute between employee groups as well as between employees and carriers"); *Delta-Chicago & Southern Merger Case*, 16 C.A.B. 647, 655 (1952) ("Moreover, there is nothing in the Delta-C&S proposal [Section 13] which would inhibit the right of a dissatisfied Delta employee or group of such employees to seek arbitration of grievances over integration of seniority lists."); *American-Trans Caribbean Merger*, CAB Order 71-5-30 at 4 (1971) ("any affected party has the right to arbitrate any bona fide dispute of a non-frivolous nature"); *American-Trans Caribbean Merger*, 60 C.A.B. 835, 837 n.4 (1972) ("clearly the provisions [LPP Section 13] were intended to be applicable whether two or more parties are involved"); *Delta*

The courts similarly have recognized the absolute right to arbitrate disputes under Section 13 or similar provisions. *Delta Air Lines, Inc., v. CAB*, 574 F.2d 546, 548 (D.C. Cir.), *cert. denied*, 439 U.S. 819 (1978) (Delta "conceded its duty to arbitrate the seniority dispute upon demand of dissatisfied stewardesses or their authorized representative"); *American Airlines, Inc. v. CAB*, 445 F.2d 891, 894 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972) (either party has "the absolute right to select arbitration").[5]

*Second*, the decision of the court below unlawfully restricts the application of the RLA by confining that Act to disputes arising out of collective bargaining agreements (A.4a). This Court should grant review to confirm that the promise to arbitrate disputes under the LPPs is enforceable directly under the RLA.

In 45 U.S.C. § 152 First, the RLA imposes a duty upon all carriers to:

> exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements *or otherwise*, in order to avoid any interruption to commerce or to the operation of any carrier growing out

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*Air Lines, Employee Integration*, 63 C.A.B. 700, 702 (1973) ("Delta has conceded, at least initially, that it is under a duty to arbitrate any unresolved seniority issue upon demand of any dissatisfied former Northeast employee or group of employees, and in our view that obligation is clear.").

[5] *See New Orleans & Northeastern R.R. Co. v. Bozeman*, 312 F.2d 264, 268 (5th Cir. 1963) ("The language plainly means that either party may make an election, binding on the other, to refer the dispute to arbitration."); *Int'l Brotherhood of Teamsters v. Texas Int'l Airlines*, 717 F.2d 157, 160 (5th Cir. 1983) ("They [LPPs] require also that arbitration be available at the instance of any employee or group of employees to resolve any dispute relating to seniority integration or any other dispute about the application of the labor protective provisions.").

> of any dispute between the carrier and the employees thereof. (Emphasis added)

*See* 45 U.S.C. § 151a (purposes of the Act).

A carrier's duty under Section 152 First to "make and maintain agreements" and to "settle all disputes" lies at the "heart" of the RLA, and that obligation may be enforced "by appropriate judicial means." *Chicago & Northwestern Ry. Co. v. Transportation Union*, 402 U.S. 570, 574, 581 (1971) (quoting in part *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969)). The lower court's holding is contrary to the express terms of the statute and is contrary to the federal court's duty to enforce the RLA. *See ALPA v. Transamerica Airlines*, 817 F.2d 510, 514 (9th Cir.), *cert. denied*, 484 U.S. 963 (1987); *see also Int'l Ass'n of Machinists v. Alaska Airlines, Inc.*, 813 F.2d 1038, 1040 (9th Cir. 1987) (federal courts have direct jurisdiction over RLA claims where judicial enforcement is the only means of enforcing the RLA).

In limiting Section 152 First to disputes that arise out of collective bargaining agreements, the Ninth Circuit apparently followed the district court's analysis of the RLA, which cited *Chicago River & Indiana R.R. Co. v. Brotherhood of R.R. Trainmen*, 229 F.2d 926 (7th Cir. 1956), *aff'd*, 353 U.S. 30, *reh'g denied*, 353 U.S. 948 (1957). In *Chicago River*, the court held that the RLA authorizes the issuance of injunctions to prevent strikes over minor disputes. The passage relied upon by the district court described the distinction between a major and minor dispute. It was in reference to minor disputes that the *Chicago River* court stated that "the act contemplates the existence of a collective agreement already concluded." 229 F.2d at 929. The court did not state or even imply that a carrier's duty under Section 152 was limited to the settlement of minor disputes.

The dispute over plaintiffs' right to arbitration under the LPPs here is neither a "minor" nor a "major" dis-

pute as the courts have employed those terms in RLA decisions, because the LPP protections are independent of the collective bargaining process. In these circumstances, the court has jurisdiction directly under the RLA to address carrier and union violations of the LPPs. *See Chicago & Northwestern Ry., supra*; *Transamerica Airlines, supra*; *Brotherhood of Ry. Airline & Steamship Clerks v. Atchison, Topeka and Santa Fe Ry. Co.*, 847 F.2d 403, 408 (7th Cir. 1988) ("federal court may exercise jurisdiction over violations of the Railway Labor act without regard to the court's characterization of the dispute as major or minor").

*Third*, the duty to settle disputes through arbitration takes on even greater significance in this case where plaintiffs claimed that the integrated seniority list was a product of unlawful threats, intimidation and coercion on Delta's part and a breach of the duty of fair representation on ALPA's part.

In disregarding the Western pilots' arbitral rights on the ground that Delta and ALPA had reached an agreement on the integrated seniority list, the Ninth Circuit blinded itself to whether the means by which the list was agreed upon vitiated the agreement itself. The court of appeals followed the lead of the district court which erroneously held that Section 3 of the LPPs universally bars arbitration where the carrier and the union have agreed on a merged seniority list. Both courts ignored the important exception carved out by the CAB, which would allow arbitration despite a union-carrier agreement "on a showing of bad faith . . . or other compelling circumstances," *Delta-Chicago & Southern*, 29 C.A.B. at 1349, or where the list was "tainted by the union's breach of its duty of fair representation," *Pan American-Acquisition of Control of, and Merger with National*, CAB Order 82-4-75 at 3 (1982).[6]

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[6] *See American Airlines, Inc. v. CAB*, 445 F.2d at 893 (court upheld CAB arbitration order notwithstanding agreement between

The Ninth Circuit did not address the pilots' prominent argument that the agreement to the list was void because it was secured by threats, intimidation, and coercion. It also refused to address the pilots' showing that even if such duress was permissible as part of the give and take of collective bargaining, no such collective bargaining took place. The Western pilot representatives who received Delta's threats and signed the list were not ALPA collective bargaining representatives and were not authorized to enter into agreements with the carrier. They were authorized only to reach agreement with the other pilot group, after which the union's authorized representatives would attempt to bargain with Delta and to have the agreement inserted in the collective bargaining agreement. For this reason, Delta was able to exert its economic power over the Western merger representatives who lacked any authority or economic leverage to resist Delta's demands. If the lower court's decision remains unreviewed, an employer's promise of arbitration, even if otherwise enforceable under the RLA, could be made hollow by using threats to force a pre-arbitration settlement.[7]

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American and the union representing American pilots); *see also Allegheny-Mohawk Merger Case (Complaint of Kingston and Foster)*, CAB Order 79-11-53 at 14 (1979) (arbitration not ordered where there was no defect in the ALPA merger procedures and no interference by the carrier in the list merger process; carrier "assumed a position of neutrality").

[7] The lower court also did not attempt to address the pilots' claim that the threats, coercion and intimidation were independent violations of 45 U.S.C. § 152 which requires carriers to exert every reasonable effort to maintain agreements concerning labor conditions. As the Court has recognized:

> All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the act, must depend for success on the uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached and the peace

Finally, the lower court did not attempt to address the pilots' claim that ALPA violated its duty of fair representation when it failed to follow its own internal procedures for merging the seniority lists. *See Bernard v. ALPA*, 873 F.2d 213, 216 (9th Cir. 1988); *Rogers v. ALPA*, No. H-84-3985 (S.D.Tex. Nov. 14, 1988); *see also Robesky v. Qantas Empire Airways Limited*, 573 F.2d 1082, 1090 (9th Cir. 1978) (even non-hostile acts of omission by union may breach duty of fair representation where they fall short of minimum standards of fairness, prejudice employees, and do not relate to legitimate union interests).

## III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN THE CIRCUITS CONCERNING THE SCOPE OF THE FAA'S ENFORCEMENT PROVISIONS

There is a dispute between the Ninth Circuit and other circuits with respect to whether signatories to an agreement are the only parties who may enforce an agreement to arbitrate. The court below ruled that the Western pilots could not rely upon the FAA because the statute "is invoked only by a written agreement between the parties to arbitrate" (A.5a). Apparently, the Court concluded that because the Western pilots did not sign the merger agreement, they were not parties to the agreement who were entitled to enforce the employer's promise to arbitrate. This reasoning is contrary to the terms of the statute which does not limit enforcement to contract signatories. Instead it broadly states the principle that a written provision to settle controversies by arbitration shall be valid, irrevocable and enforceable. 9 U.S.C. § 2. Other circuits considering the issue

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essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained.

*Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 569 (1930).

have decided that ordinary contract principles determine who is bound by a promise to arbitrate and that the parties involved need not be signatories. *McAllister Bros., Inc. v. A&S Transportation Co.*, 621 F.2d 519, 524 (2d Cir. 1980); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987); *Valero Refining, Inc. v. M/T Lauberhorn*, 813 F.2d 60, 63-64 (5th Cir. 1987).

Certiorari should also be granted to resolve the important federal question concerning the "contracts of employment" exclusion under the FAA. 9 U.S.C. § 1. The court below, apparently drawing upon the district court's incorrect holding that the LPPs are "indistinguishable from a collective bargaining agreement" (A.15a), erroneously held that the merger agreement between Western and Delta was a contract of employment and unenforceable under the FAA (A.5a). The court cited no basis for this decision, which is contrary to the Court's "strong endorsement of the federal statutes favoring [arbitration]." *Rodriguez*, 109 S.Ct. at 1920.

## CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the Ninth Circuit.

Respectfully submitted,

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January 1990

# APPENDIX

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**APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 88-6182
DC No. CV-87-5725-RJK

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PATRICK A. HERRING, JR.; RICHARD A. BREMS; JOSEPH HALEY; RONALD L. JENKINS, *et al.*,
*Plaintiffs-Appellants,*

v.

DELTA AIR LINES, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
*Defendants-Appellees.*

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Appeal from the United States District Court
for the Central District of California
Robert J. Kelleher, District Judge Presiding

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Argued and Submitted: June 27, 1989
Pasadena, California

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MEMORANDUM *

[Filed Oct. 13, 1989]

Before: NELSON and BOOCHEVER, Circuit Judges, and BROWNING ** District Judge.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Hon. William D. Browning, United States District Judge for the District of Arizona, sitting by designation.

The plaintiffs-appellants, Patrick Herring and a group of Delta Airline pilots, appeal the district court's grant of summary judgment to defendants-appellees, Delta Air Lines, Inc., ("Delta") and Air Line Pilots Association, International, ("ALPA"). The plaintiffs-appellants also appeal the district court's denial of their motions to compel discovery, to strike portions of declarations, and to add more plaintiffs to their complaint. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, 1337, and 2201. The appellate court has jurisdiction pursuant to 28 U.S.C. § 1291. We review grants of summary judgment *de novo*. *Eagle v. Am. Tel. & Tel. Co.*, 769 F.2d 541, 547 (9th Cir. 1985). We review denials of motions to compel discovery and to strike portions of declarations for abuse of discretion. *Draper v. Coombs*, 792 F.2d 915, 924 (9th Cir. 1986). We review the denial of leave to amend after a responsive pleading has been filed for an abuse of discretion. *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Serv. Bureau*, 701 F.2d 1276, 1292 (9th Cir.), *cert. denied*, 464 U.S. 822 (1983).

In 1986, two airlines, Delta and Western Airlines, Inc., ("Western"), agreed to merge. As part of the merger agreement, Delta, the surviving entity, pledged to negotiate an integration of the two pilot seniority lists with ALPA, the pilots' union. Both Delta's pilots and Western's pilots were represented by ALPA. Delta stated that the labor issues arising during implementation of the merger would be performed according to a system of industry practices known as labor protection provisions ("LPPs").

The integration of a seniority list involves much more than listing pilots according to the date that each began work. It encompasses such variables as the pilot's rank (*e.g.*, captain, first officers, etc.), and the kind of aircraft with which a pilot has had experience. Therefore, the allocation of employment costs and benefits created by a

merger is a difficult one. After strenuous negotiations, management reached an agreement with the union. The agreement was incorporated into the Delta-ALPA collective bargaining agreement.

This agreement was acceptable to most of the pilots but was unacceptable to Herring and to a majority of the pilots who formerly had flown for Western. These pilots seek to overturn the agreement between Delta and ALPA and to send the matter to arbitration. They rest their claim on numerous grounds. The pilots allege that: 1) the appellees violated the LPPs; 2) the appellees violated the Railway Labor Act ("RLA"); 3) the appellees violated the Federal Arbitration Act ("FAA"); 4) the appellees breached a contract in which the appellants were third-party beneficiaries; and 5) ALPA did not fulfill its duty of fair representation ("DFR") to appellants. We affirm the judgments of the district court.

## DISCUSSION

### I. The Labor Protection Provisions Grounds

Originally, government regulatory agencies imposed LPPs as a condition of allowing mergers between railway systems. The LPPs served to protect the employees whose job security could be altered through a merger. As similar consolidations occurred in the airline industry, the government standardized and imposed analogous LPPs. Following the Airline Deregulation Act of 1978, the government no longer imposed LPPs. However, the parties to a merger may adopt, as part of their agreement, these standardized provisions. In this merger, the parties voluntarily accepted these standardized provisions.

Section 3 of the LPPs governs the integration of seniority lists following a merger between two carriers. Section 3 provides:

> In so far as the merger affects the seniority rights of the carriers' employees, provisions shall be made

> for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13.

Section 3 does not provide any grounds for the appellants' argument. First, ALPA, not the appellants, is the representative of the pilots for collective bargaining purposes. Only the collective bargaining representatives (or the carrier) may submit a dispute over the integration of seniority lists to arbitration.[1] Second, the record shows that no dispute exists, in fact the parties' negotiations resulted in an agreement. Therefore, the LPPs provide no grounds for the appellants' action.

II. The Railway Labor Act Grounds

The appellants claim that Delta and ALPA violated the RLA, 45 U.S.C. § 151a and 152 First and Second. These sections govern disputes between business organizations and labor unions that arise out of a collective bargaining agreement. *Hendricks v. Airline Pilots Ass'n*, 696 F.2d 673 (9th Cir. 1983). The sections are not applicable because this case presents no dispute between Delta and ALPA. The appellants also allege that Delta engaged in intimidating and coercive behavior that violated section 152 Third. This section provides that employees have a right to select a collective bargaining representative without "interference, influence, or coercion" from the carrier. Section 152 Fourth prohibits a carrier from interfering with its employees' right to join or to refrain from joining a collective bargaining unit. ALPA

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[1] Additionally, the pilot's representatives working on the merger agreement could have asked ALPA for an arbitrator if they could not agree. ALPA also could have requested an arbitrator if it could not agree with Delta.

is the only labor organization involved in this case and neither Delta nor ALPA attempted to influence the pilots to join or to leave ALPA or any other union. Therefore, these RLA sections cited by the appellants are inapplicable.

The appellants also argue that Delta and ALPA violated the RLA by demoting Herring and that Delta violated the RLA by refusing to allow appellants to use Delta pilot mailboxes to communicate regarding their protests. No private cause of action exists under the RLA for a group of employees who assert retaliatory conduct based upon employee activities which bear no relationship to establishing a union, or to employer activities that bear no relationship to undermining a union. *Klemens v. Air Line Pilots Ass'n, Int'l*, 736 F.2d 491, 496 (9th Cir.), *cert. denied*, 469 U.S. 1019 (1984). Therefore, these allegations, even if true, do not constitute a violation of the RLA in this situation.

III. The Federal Arbitration Grounds

Appellants also allege that the FAA, 9 U.S.C. §§ 1-14 required the appellees to arbitrate the seniority dispute. This statute is invoked only by a written agreement between the parties to arbitrate. Moreover, the statute specifically excludes from coverage "contracts of employment." Therefore, the appellants' reliance upon the FAA is misplaced.

IV. The Third Party Beneficiary Grounds

The appellants argued that they, as individual employees, are third party beneficiaries of a contract between Western and Delta to provide LPPs. Under this theory, Delta became liable to appellant when it breached the LPPs. This argument fails because Delta did not breach the LPPs, as we discussed above.

V. The Duty of Fair Representation Grounds

The appellants contend that ALPA breached its duty of fair representation ("DFR") owed to them under the RLA. They claim that the union breached this duty by acting in "hostile, arbitrary, and invidious, and discriminatory manner." The appellants base this argument on only unsupported statements that provide no concrete evidence that ALPA breached the duty of fair representation. These statements are insufficient to survive the ALPA's summary judgment motion. The courts allow a union a "wide range of reasonableness" in the conduct of its representation of its members. It must be able to focus on the needs of its whole membership without undue fear of law suits from individual members. *Bautista v. Pan American World Airways*, 828 F.2d 546, 549 (9th Cir. 1987). The integration of a seniority list is a difficult undertaking because of the inevitability that some individual employees will be disadvantaged in comparison to others. In these circumstances, a union does not breach its duty of fair representation to others as long as it proceeds on some reasoned basis. *Clayton v. Republic Airlines*, 716 F.2d 729 (9th Cir. 1983). Therefore, the district court correctly granted summary judgment to ALPA on this issue.

VI. The District Court's Exercise of Discretion on Appellants' Motions

The appellants' arguments that the district court abused its discretion when it denied appellants' motions to compel discovery, to strike portions of declarations, and to add more plaintiffs is without merit. The records show that the appellants did not pursue discovery diligently before summary judgment. *Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1539, 1443 (sic) (9th Cir. 1986). If the portions of the ALPA declarations to which appellants objected had been stricken, more than sufficient evidence remained to justify summary judg-

ment. *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 698 (1988). The addition of more plaintiffs would have been a futile act that would not have affected the issues underlying the grant of summary judgment. *Klamath-Lake Pharmaceutical Ass'n*, 701 F.2d at 1293. Therefore, the district court did not abuse its discretion in denying appellants' motions.

## CONCLUSION

We AFFIRM the judgments of the district court.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 88-6182
USDC No. CV 87-5725-RJK

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PATRICK A. HERRING, JR.; RICHARD A. BREMS; JOSEPH HALEY; RONALD L. JENKINS, *et al.*,
*Plaintiffs-Appellants,*

v.

DELTA AIR LINES, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
*Defendants-Appellees.*

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ORDER

[Filed Sept. 11, 1989]

Before: NELSON and BOOCHEVER, Circuit Judges, and BROWNING*, District Judge.

Appellants' motion for remand is DENIED.

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* Hon. William D. Browning, United States District Judge for the District of Arizona, sitting by designation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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No. CV 87-5725-RJK (Tx)

PATRICK A. HERRING, JR., *et al.*,
*Plaintiffs,*

v.

DELTA AIR LINES, INC., and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
*Defendants.*

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## MEMORANDUM OF DECISION AND ORDER

[Filed May 11, 1988]

Before the Court are several motions, including each party's motion for summary judgment. At the hearing of this matter on February 8, 1988, the Court stated its inclination to grant the motions for summary judgment filed by defendants Air Line Pilots Association, International ("ALPA") and Delta Air Lines, Inc. ("Delta"), but afforded plaintiffs a final opportunity with which to set forth genuine issues of material fact so as to avoid summary judgment. The Court, having heard and read the evidence, and having read and carefully considered the filings submitted after the February 8, 1988 hearing, makes its decision and order as follows:

(1) Defendant ALPA's motion for summary judgment is granted in full.

(2) Defendant Delta's motion for summary judgment is granted in full.

(3) All other motions before the Court are denied.

(4) Each party is to bear its own costs for all motions.

DISCUSSION

Cases of this nature were summed up perceptively by then Circuit Judge, later Chief Justice, Burger, who wrote: "By its very nature, the process of integrating . . . two seniority-lists can sometimes lead to consequences unfavorable to some." *Outline v. C.A.B.*, 284 F.2d 224, 228 (D.C.Cir. 1960). Many plaintiffs herein are greatly dissatisfied with the consequences they face as a result of the merger between their former employer and Delta, as evidenced by their large turnout at the February 8th hearing Nevertheless, as the Court then stated, this is not a matter of great complexity. Even if we are to accept plaintiffs' characterization of the events as true for purposes of defendants' summary judgment motions, there is no legal justification for this Court to intervene into the agreement borne out of the merger between Western Air Lines and Delta Air Lines.

*COUNT 1*

In Count 1, plaintiffs assert that Delta and ALPA violated both the Labor Protective Provisions ("LPPs") and the Railway Labor Act ("RLA") by refusing to arbitrate plaintiffs' protest of the integrated seniority list. As a matter of law, neither the LPPs nor the RLA provide these plaintiffs with arbitration rights.

A. *The LPPs*

Plaintiffs rely heavily on § 13 of the LPPs. Section 13 is a general dispute resolution clause that covers a variety of potential disputes which may arise out of a merger. This is not, however, a general dispute. The very situation that concerns us—a disputed seniority list integration—is explicitly covered by § 3 of the LPPs. Section 3 provides:

> Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13.

Obviously, § 3 supercedes the general dispute resolution of § 13 when seniority list integration is at issue. Moreover, arbitration of a seniority list integration dispute is available under § 3 only when two conditions have been met: (1) A "party" within the meaning of § 3 must invoke the arbitration mechanism outlined in § 13, and (2) The "carrier and the representatives of the employees affected" must fail to agree on a list. The undisputed material facts show that neither condition occurred.

Here, the "parties" are the carrier—Delta—and the employees' collective bargaining representative—ALPA. Neither one of these *parties* sought to invoke § 13, *and they reached an agreement.* The very language of the LPPs denies plaintiffs the right to arbitration they claim entitlement to. The LPPs confer no right on individual employees, such as plaintiffs in this case, to submit their disagreement with a negotiated seniority list to arbitration.

This construction is in accord with the consistent administrative and judicial interpretation of identical LPPs, which confirm that § 3 does not contemplate submission of seniority list integration disputes to arbitration where the carriers and union have reached agreement and the dispute is only among a group of the merging employees. *See, e.g., Pan American-National,* Order No. 82-4-75, slip op. at 1 ("We have long held that, pursuant to LPP § 3, the surviving carrier of a . . .

merger and the affected employees [via their representatives of the RLA] are responsible for integrating seniority lists. Only when the carrier and the employees' representatives disagree on seniority do we intrude, by ensuring that the parties arbitrate.").

B. *The RLA*

In Count 1 plaintiffs also allege that Delta's and ALPA's refusal to arbitrate violated the RLA, apparently contending that the RLA either imposes a duty to arbitrate under the LPPs or to "engage in conference" concerning the plaintiffs' protest. Plaintiffs rely on 45 U.S.C. § 151a, § 152 First and Second, which provide generally for the "prompt and orderly settlement of disputes concerning . . . working conditions," and which require carriers to "exert every effort to make and maintain agreements . . . and to settle all disputes [arising thereunder]."

The plain language of §§ 151a and 152 make clear that these sections do not require the carrier and collective bargaining representative to resolve promptly *any* dispute that might arise, but instead are limited to compelling prompt resolution of disputes *arising out* of a collective bargaining agreement. As the court held in *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R. Co.*, 229 F.2d 926 (7th Cir. 1956), *aff'd*, 353 U.S. 30, *reh'g denied*, 353 U.S. 948 (1957), these provisions contemplate "the existence of a collective bargaining agreement already concluded," and disputes which relate either to the meaning or proper application of a particular provision in such an agreement with a reference to a specific situation.

The dispute in this case does not involve the interpretation of an existing collective bargaining agreement. Instead, plaintiffs have attempted to raise a dispute between themselves and their collective bargaining representative on the basis that ALPA should not have en-

tered into the agreement concerning seniority integration. Such disputes are not covered by the express provisions of the RLA. It is precisely for this reason that courts have developed the doctrine of the duty of fair representation which provides employees who are represented by a collective bargaining agreement with a means of challenging the actions of the bargaining representative under certain circumstances. The duty of fair representation claim is discussed below under Count 5.

Because, as a matter of law, neither defendant has violated the RLA or breached the LPPs, they are each entitled to summary judgment on Count 1.

*COUNT 2*

In Count 2, plaintiffs allege that in "intervening" with the employee negotiations which were proceeding pursuant to ALPA merger policies, and in using "intimidation" and "coercion," defendants breached the LPPs and the RLA. Even if plaintiffs' characterization of defendants' conduct is accepted, such conduct does not violate either the LPPs or the RLA.

In Count 2, plaintiffs rely not only on 45 U.S.C. §§ 151a and 152 First and Second, discussed above, but also on § 152 Third and Fourth. A look at these sections shows that they do not apply here. Section 152 Third provides that employees have the right to select a collective bargaining representative without "interference, influence or coercion" from the carrier. Here, no dispute exists concerning employee selection of a collective bargaining representative.

Section 152 Fourth states that a carrier shall not deny the right of its employees to join or refrain from joining a labor organization, and that it shall be unlawful for the carrier to "interfere in any way with the organization of its employees." Again, ALPA was, and is, the

plaintiffs' union at all times, and Delta never once tried to influence anyone to join or to not leave ALPA. There is not even the suggestion that plaintiffs at any time were attempting to organize a rival union.

On both accounts plaintiffs misconceive the purposes and language of the Railway Labor Act. That language refers only to influence and coercion with respect to the *selection* of a collective bargaining representative. *Independent Union of Flight Attendants v. Pan American World Airways*, 789 F.2d 139 (2d Cir. 1986). It does not purport to deal with conduct that takes place *in the collective bargaining process.*

Further, even if the Court were to construe Delta's statements and conduct as "threats," the courts have long recognized that, in the context of collective bargaining, economic threats to gain concessions at the bargaining table are entirely lawful. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). It is well settled law that the process of labor negotiations is fundamentally one of "compromise and economic pressure." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 336 (1981). Because the collective bargaining process necessarily contemplates both the use and threatened use of economic weapons, the courts have refused to rescind labor contracts which might otherwise be considered coercive outside the context of labor negotiations.

Here, Delta and ALPA reached agreement on an integrated seniority list. Absent unfair representation, the RLA does not grant this Court jurisdiction over an unfair bargaining claim when the parties have bargained and reached an agreement.

*COUNT 6*

In Count 6, plaintiffs contend that defendants violated the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, by refusing to aribtrate the seniority dispute under

the LPPs. Again accepting plaintiffs' version of the facts, defendants are entitled to summary judgment.

Section 2 of the FAA requires a written agreement to arbitrate in order to invoke the Act. As was discussed in the analysis of Count 1, the LPPs do not provide for arbitration of the integrated seniority list at the request of individuals when those individuals are represented by a collective bargaining representative, and they do not provide for arbitration at all in cases where the carrier and the collective bargaining representative have agreed upon a list. On this basis alone Count 6 fails.

Moreover, § 1 of the FAA specifically excludes "contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce." The statute does not specifically define "contracts of employment," but it is nonsensical to accept plaintiffs' argument that the LPPs are a commercial contract and not a contract of employment.

The LPPs are designed specifically for the area of mergers, and are for the protection of employees. They are the subject of many cases in the labor area. In effect, they are indistinguishable from a collective bargaining agreement: they establish conditions and terms of employment for the benefit of an identifiable group; they provide for collective bargaining over that term or condition; and they set forth procedures for resolving disputes if the union and employer cannot reach agreement. Further, as in the context of a collective bargaining agreement, in Count 5 plaintiffs allege that ALPA breached its duty of fair representation in connection with its negotiations over the integrated seniority list.

In short, the LPPs do not grant these plaintiffs a right to invoke the Federal Arbitration Act, and defendants should be granted summary judgment on Count 6.

*COUNT 7*

In Count 7, plaintiffs allege that they are third-party beneficiaries of the agreement between Delta and Western to provide LPPs, and that because Delta "breached" the LPPs they have a claim for breach of contract.

As discussed above, defendants did not breach the LPPs. Since no breach occurred, plaintiffs cannot be the beneficiaries of any such breached contract, and Count 7 fails.

*COUNT 5*

In Count 5, plaintiffs contend that ALPA breached its duty of fair representation under the RLA by acting in a "hostile, arbitrary, invidious, and discriminatory manner." Plaintiffs contend that their supplementary Statement of Genuine Issues of Material Fact helps demonstrate that defendants' summary judgment motions should be denied. This document, however, simply summarizes what plaintiffs claim to believe.

Similar tactics were rejected in a duty of fair representation ("DFR") suit in *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 572 F. Supp. 1494 (N.D.Ill. 1983), *aff'd*, 756 F.2d 1274 (7th Cir. 1985). There, the court held that "[p]laintiffs' attempt to develop their allegations by unsupported statements in their memorandum opposing summary judgment" provided no "concerete evidence" of a breach of the duty of fair representation and could not defeat ALPA's motion for summary judgment. *Id.* at 1508.

Here, plaintiffs' DFR allegations are steeped in innuendo. The facts show that ALPA was at no time bound to arbitrate the integrated seniority list. In the context of representing its members at the bargaining table, a union must be allowed "a wide range of reasonableness" because it must be able to "focus on the needs of its membership as a whole without undue fear of law-

suits from individual members disgruntled by the result of the collective process." *Bautista v. Pan American world* (sic) *Airways*, 828 F.2d 546, 549 (9th Cir. 1987). ALPA's conduct fell well within the "wide range of reasonableness" the Court must accord it. "Partisan exhortation delivered under conditions of conflict" are not the basis of a DFR suit. *Id.* at 551.

There is a body of cases extant which deals with DFR suits within the integration of seniority lists-merger area. *See, e.g., Humphrey v. Moore*, 375 U.S. 335 (1962). These cases have observed that within this context, it is almost inevitable that some individuals will be injured, and that even where the same union represents both bodies of employees, it does not breach its DFR to individual members so long as it proceeds on some reasoned basis. *Clayton v. republic* (sic) *Airlines*, 716 F.2d 729 (9th Cir. 1983). The facts, when sifted from the innuendo, show that ALPA at the very least met this standard and is entitled to summary judgment on Count 5.

*COUNTS 3 & 4*

Count 3 alleges that by demoting Herring, Delta violated the RLA, and adds in an allegation that ALPA participated in this violation. Count 4 alleges that Delta (ALPA is not named in Count 4) violated the RLA by refusing to allow plaintiffs to use Delta pilot mailboxes to communicate regarding their protest.

There is absolutely no evidence to tie in ALPA to the alleged facts in Count 3, and they are entitled to summary judgment on that basis. Moreover, defendants are entitled to summary judgment on Counts 3 and 4 because both the plain language of the RLA and the cases decided thereunder make clear that the RLA does not cover the activity alleged. These plaintiffs were not engaged in union-related activity, as is required if one wishes to state a private cause of action under the RLA. There are no controlling cases, including the cases cited

by plaintiffs in their papers, that hold that a private cause of action exists under the RLA for a group of employees who assert retaliatory conduct based upon activities which bear no relationship to organizing to establish a union or company activity designed to undermine a union.

THEREFORE, IT IS ORDERED that each defendant's motion for summary judgment be GRANTED. IT IS FURTHER ORDERED that all other motions before the Court are DENIED. Each party is to bear its own costs for all motions.

The Clerk shall send, by United States mail, a copy of this Memorandum of Decision and Order to counsel for the parties.

DATED: May 10, 1988.

/s/ Robert J. Kelleher
ROBERT J. KELLEHER
Senior Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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Case No. CV 87-5725-RJK

PATRICK HERRING, *et al.*

v.

DELTA AIR LINES, INC., *et al.*

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Present: HON. ROBERT J. KELLEHER, Judge
JAMES A. KIMBALL, Deputy Clerk

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CIVIL MINUTES—GENERAL

July 25, 1989

PROCEEDINGS: Plaintiffs' Motion for Relief from Judgment Pursuant to Fed.R.Civ.P. 60(b)(2)

THE COURT has before it plaintiffs' motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(2) and defendants' opposition thereto. Said motion was taken under submission on July 17, 1989, the parties having waived oral argument pursuant to Local Rule 7.11.

By this motion plaintiffs seek to reopen the Court's Order of May 12, 1988 granting summary judgment in favor of defendants on all counts. Plaintiffs have appealed the Order, and their appeal is presently pending.

The filing of the notice of appeal divests this Court of jurisdiction to dispose of a Rule 60(b) motion absent a

remand from the Court of Appeals. *Long v. Bureau of Economic Analysis*, 646 F.2d 1310, 1318 (9th Cir. 1981); *Smith v. Lujan*, 588 F.2d 1304, 1307 (9th Cir. 1979). The Court is therefore limited to indicating whether it will entertain or grant the motion. *Id.*

IT IS HEREBY ORDERED that the Court will not entertain or grant plaintiffs' motion.

The Clerk will send a copy of this Order to counsel.

/s/ JAK
Initials of Deputy Clerk

# STATUTORY PROVISIONS

## RAILWAY LABOR ACT

### § 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

### § 152. General duties

#### First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

# FEDERAL ARBITRATION ACT

## § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

## § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

**§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination**

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agree-

ment in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

## DELTA-WESTERN
## LABOR PROTECTIVE PROVISIONS

Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.

* * * *

Section 13. (a) In the event that any dispute or controversy (except as to matters arising under section 9) arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination. Unless an extension of time is agreed upon in writing by all parties, the party desiring arbitration shall give the other party or parties and the National Mediation Board written notice of the party's decision to invoke arbitration no later than 45 days after the controversy arises. The parties shall select the arbitrator from such panel alternately striking names until only one remains, and he shall serve as arbitrator. Expedited hearings and decisions will be expected, and a decision shall be rendered within 90 days after the controversy arises, unless an extension of time is mutually agreeable to all parties. The salary and expenses of the arbitrator shall be borne equally by the carrier and (i) the organization or organizations representing the employee or employees, or (ii) if unrepresented, the employee or employees or group or groups of employees. The decision of the arbitrator shall be final and binding on the parties.

(b) The above condition shall not apply if the parties by mutual agreement determine that an alternative method for dispute settlement or an alternative procedure for selection of an arbitrator is appropriate in their particular dispute. No party shall be excused from complying with the above condition by reason of having suggested an alternative method or procedure, unless and until that alternative method or procedure shall have been agreed to by all the parties.

## LIST OF PETITIONERS PURSUANT TO RULE 14.1(b)

1. Aakhus, Donovan E.
2. Abel, Richard C.
3. Adams, Robert A.
4. Akana, Akaiko A.
5. Allen, Jack L.
6. Allen, R.E.
7. Allen, Robert J.
8. Allen, Thomas R.
9. Alley, Michael L.
10. Amos, Walter N.
11. Anderson, Clarence A.
12. Anderson, J. Eric
13. Archer, Gregg B.
14. Arnold, Ronald J.
15. Arps, Stephen G.
16. Asay, Donald E.
17. Ashworth, David B.
18. Attwood, Guy E.
19. Avary, Donald D.
20. Aversman, James R.
21. Azemard, Anthony
22. Baccitich, David J.
23. Bagley, Kent K.
24. Baker, Harry C.
25. Baker, Lawrence E.
26. Bokos, Thomas M.
27. Banks, Richard A.
28. Barnhart, James R., Jr.
29. Barnum, Lewis, III
30. Barstow, James L.
31. Bartz, Charles E.
32. Bastiani, James
33. Bauer, David
34. Bauer, Philip G.
35. Bauer, Russell B.
36. Beal, David R.

37. Beck, Richard A.
38. Bell, William W.
39. Bendik, Carl M.
40. Bennett, Robert W.
41. Benson, Jerome A.
42. Benton, Douglas A.
43. Berens, Roger J.
44. Berryhill, Joseph A.
45. Best, Henry G.
46. Betts, Charles C.
47. Bibb, Harry L., Jr.
48. Birch, Frederick R.
49. Bishop, Ross M.
50. Black, Eugene R.
51. Blackman, Douglas E.
52. Blair, Thomas W.
53. Blake, A.G.
54. Blandford, John R.
55. Bodmer, John A.
56. Bodnar, James J.
57. Boline, Laurel F.
58. Bone, John R.
59. Bonfiglio, Peter, Jr.
60. Booher, Bruce R.
61. Boschetto, Dale N.
62. Boswell, Lance
63. Bourland, D.L.
64. Boyce, A.W.
65. Bradfield, Richard C.
66. Brady, John M.
67. Brant, William C.
68. Brems, Richard A.
69. Brennan, George A., Jr.
70. Brennan, James W.
71. Brickert, Richard T.
72. Brigham, Don
73. Brittenham, John C.
74. Brown, Frank D.

75. Brown, John Michael
76. Brown, Robert D.
77. Browne, Paul D.
78. Brushwylor, Robert
79. Buck, Peter D.
80. Buckelew, Arthur L.
81. Buechler, Richard P.
82. Buisson, James L.
83. Burgess, Jerald C.
84. Burkland, R.W.
85. Burnett, Gerald R.
86. Burns, John E.
87. Burrell, Russell K.
88. Burson, Gene Douglas
89. Busby, Leon R.
90. Bush, Jack B.
91. Butler, Ronald V.
92. Byrne, Charles R.
93. Byron, A.W.
94. Bytheway, Alvin R.
95. Calderon, Kenneth A.
96. Cameron, Murdo O.
97. Campbell, Donald E.
98. Cardon, Vern R.
99. Carollo, Robert A.
100. Carrol, Paul L., Jr.
101. Carter, D.L.
102. Cartwright, Allan L.
103. Castle, C.N.
104. Causey, O.H.
105. Cecka, R.J.
106. Chakerian, Gregory V.
107. Chamberlin, Alvin W.
108. Chambers, Jack P.
109. Chambre', Rudy R.
110. Chapman, Donald Ray
111. Chapman, Duane
112. Cheney, C.J.

113. Clark, Glen D.
114. Clark, John M.
115. Clausen, Christian M.
116. Clounch, Mark R.
117. Coe, K.M.
118. Cole, Richard D.
119. Colette, Thomas J.
120. Collins, Clifton M.
121. Collins, Marshall W.
122. Coln, William A., III
123. Compton, Raymond D.
124. Connel, Allan A., III
125. Cook, H.K.
126. Cook, Martin T.
127. Cook, Wendell L.
128. Cook, William S.
129. Cope, James M.
130. Coxe, Charles R.
131. Crawford, Thomas P.
132. Creeden, Wilcox J.
133. Cullem, Daniel F.
134. Davies, Donald E.
135. Davila, Manuel
136. Davis, Edward H.
137. Davis, Gale C.
138. Davis, Robert B.
139. Davis, T.H.
140. Deakers, Richard P.
141. Degnan, James E.
142. DeLong, Roger L.
143. Delzer, L.C.
144. Demosthenes, T.A.
145. Dent, C.S.
146. Der Manuel, E.M.
147. Detwiler, Mark J
148. DeVaney, Daniel T.
149. DeVaney, Roy W., Jr.
150. Diehl, Ross E.

151. Dishon, Larry E.
152. Doherty, Francis A.
153. Doiron, W. David
154. Dorris, John D.
155. Douglass, Clement J., III
156. Dowell, Lester R.
157. Doyle, Michael A.
158. Dressler, David C.
159. Duncan, Roderick M.
160. Dunlap, James V.
161. Dunn, Edward D.
162. Duran, Frank T.
163. Duricka, Richard M.
164. Edson, Robert A.
165. Edwards, Monte R.
166. Eldred, Clarence W.
167. Elin, Richard A.
168. Ellis, Ernest F.
169. Ellison, Martin D.
170. Ellmore, C.A.
171. Elmore, Jerry O.
172. Elsner, Bernard M.
173. Elstad, Erik L.
174. Engel, Robert D.
175. Erwin, William T.
176. Etter, George W.
177. Eustis, James B.
178. Evans, Earl E., Jr.
179. Evans, Stuart C.
180. Everson, Ken W., Jr.
181. Exley, Ronald W.
182. Farrell, Robert J.
183. Ferg, Richard G.
184. Ferguson, James T., III
185. Fernandez, Peter S.
186. Fernandez, Ralph E.
187. Ferrell, H. Lee
188. Ferrell, Mallory H., Jr.

189. Ferris, Roger E.
190. Finnegan, John M.
191. Flaherty, George F.
192. Flandreau, Donald H.
193. Fletcher, Ferinand E.
194. Fletcher, Steve
195. Forster, Thomas L.
196. Foster, David V.
197. Fowler, Arthur H.
198. Fowler, Steve
199. Fox, Jim
200. Franks, Stanley K., Jr.
201. Freeding, Richard A., Jr.
202. Frey, T.E.
203. Frye, Arthur R.
204. Fuller, Roger Dell, Jr.
205. Gaeb, H. Michael
206. Gaillard, William B.
207. Gaines, Alan L.
208. Gallagher, J.P.
209. Gallagher, William R., Jr.
210. Gerrior, William P.
211. Gibbons, James A.
212. Gibbs, James Paul
213. Giery, Patrick J.
214. Gilbert, Ronald G.
215. Gillease, Dennis B.
216. Gillespie, A.A.
217. Gilmore, Ronald G.
218. Givens, Williams G.
219. Glazar, Richard C.
220. Glazier, Patrick M.
221. Goggin, John L., Jr.
222. Goldt, Thomas G.
223. Goltry, W.H.
224. Gomez, Alfred, Jr.
225. Gonzales, Dennis M.
226. Gorrell, Don L.

227. Gottschalk, Gary L.
228. Graff, Randall M.
229. Grammer, Bryan K.
230. Graue, James T.
231. Gray, Michael Lewis
232. Greenwood, Jeffrey G.
233. Grimditch, William H.
234. Grippo, Lawrence A.
235. Grohs, Joseph M.
236. Grose, Dennis R.
237. Grundy, Joel R.
238. Guest, Raymond R.
239. Guiton, Leonard A., Jr.
240. Gullickson, Reese E.
241. Gustaveson, Roy C.
242. Haas, Tallmadge J.
243. Halcomb, Robert D., Jr.
244. Hales, Dent
245. Haley, Joseph
246. Hall, Edward M.
247. Hallinen, John C.
248. Hallor, A.E.
249. Hallsman, Charles
250. Hamilton, Roger L.
251. Hannan, Michael T.
252. Hanson, David E.
253. Harbold, Dean R.
254. Harman, Barry W.
255. Harrison, John C.
256. Hartman, William
257. Harwood, James C.
258. Hash, George J.
259. Hathcock, Richard B.
260. Hayes, James L.
261. Hearn, R.A.
262. Heatherly, James C.
263. Hedges, Grant K.
264. Heinrich, Edwin C., Jr.

265. Heintz, Kenneth H.
266. Heinz, H.C., Jr.
267. Helker, Harlen J.
268. Hellwig, Erwin Douglas
269. Hemminger, John A.
270. Herring, Patrick A., Jr.
271. Herrington, Norman L.
272. Herriott, Robert P.
273. Hicks, Gerald F.
274. Hill, Robert Daniel
275. Hines, Johnny H.
276. Hitchcock, Thomas .
277. Hoffman, Peter T.
278. Hoffman, William C.
279. Hogan, John V.
280. Holiday, Ray K.
281. Homann, Robert L.
282. Honeycutt, Jimmy L.
283. Horrell, Roger T.
284. Horton, Larry F.
285. Hoskins, Lonnie, Jr.
286. Houdeshel, Harry F., III
287. Housel, Herschel C.
288. Howatt, J.O.
289. Hoyt, Lewis E.
290. Huerta, J. Jess
291. Hunter, Thomas E., Jr.
292. Hymel, Philip J.
293. Ice, Willard F., Jr.
294. Interrieden, Richard L.
295. Insogna, Dominic M.
296. Inzana, Anthony F., II
297. Isler, Robert T.
298. James, Tommy L.
299. Jeffery, Kirk W.
300. Jeffrey, Kent A.
301. Jella, Jeffrey D.
302. Jenkins, Ronald L.

303. Johnson, Christopher W.
304. Johnson, David C.
305. Johnson, Dennis A.
306. Johnson, Donald M., Jr.
307. Johnson, Kenneth L.
308. Johnson, Lance J.
309. Johnson, Linn V.
310. Johnson, Mark L.
311. Johnson, Richard A.
312. Johnson, Scott L.
313. Jones, John Douglas
314. Jones, Walter B.
315. Jones, William Larry
316. Jorgensen, Stanley Alfred
317. Joslyn, Wilbert C.
318. Just, Peter G.
319. Kaminski, Steve
320. Kastler, Mark N.
321. Katka, Doran W.
322. Keesey, I.L.
323. Kelly, Budd J.
324. Kennedy, Michael E.
325. Kerr, David T.
326. Keyes, Jack L.
327. Kimbrel, Michael G.
328. Kisla, Daniel F.
229. Knutson, James D.
330. Komberec, C.R.
331. Koski, Duane M.
332. Koster, Kenneth K.
333. Kowalzyk, Dennis J.
334. Kramer, David W.
335. Kratzer, Frank
336. Krayniak, George L.
337. Krebs, Richard G.
338. Kuntz, Gordon B.
339. Lagomarsino, Dan A.
340. Landroth, Dale M.

341. LaPierre, Valmere M.
342. Laraux, Charles
343. Larsen, Mark H.
344. Law, C.W.
345. Layman, Phillip B.
346. Lecy, H.E.
347. Leddy, P.F.
348. Lee, John B.
349. Lentz, Gregory P.
350. Leseberg, Mark, E.
351. Lewis, Donald W.
352. Lewis, Robert H.
353. Lindquist, Robert M.
354. Little, Frank R.
355. Loeber, A. Wayne
356. Loucka, William M.
357. Lovell, William C., Jr.
358. Lowenberg, Larry W.
359. Loyd, Tracy E.
360. Lugar, Jeffrey R.
361. Luger, Jerome R.
362. Lundblad, Kurt D.
363. Luplow, Kenneth B.
364. Lyon, David E.
365. Lyon, Robert G., Jr.
366. Lyons, Terence
367. MacKenzie, J.D.
368. MacLean, William
369. Maddox, Donald L.
370. Madigan, Edwin F.
371. Magnell, Michael K.
372. Maher, Michael P.
373. Mainwaring, Stephen A.
374. Malone, D.P.
375. Mantei, Ronald H.
376. Margolin, Donald B.
377. Marshall, Sheff
378. Martin, Daryl T.

379. Martin, Richard D.
380. Mason, Wallace J.
381. Massey, Calvin L., Jr.
382. Mather, David R.
383. Mayer, John S.
384. Maxey, W.R.
385. McAdams, John A.
386. McCarthy, Matthew A.
387. McCauley, Keith C.
388. McCrary, Richard A.
389. McCready, James L.
390. McCullough, Charles J.
391. McDole, Joe C.
392. McDonald, Clinton R.
393. McDonald, Gerald H.
394. McGaw, William A.
395. McGee, Michael R.
396. McGibney, Michael D.
397. McGrath, P.R.
398. McGuire, Fay W.
399. McHargue, Gary R.
400. McKelvey, David J.
401. McKinnon, Alan J.
402. McLaughlin, John E.
403. McMahan, William R.
404. McMillan, Gerald M.
405. McMullen, William T.
406. Means, Don R.
407. Meier, L. Duane
408. Melton, Michael L.
409. Merena, David Bruce
410. Messmore, Michael H.
411. Messner, Michael W.
412. Meyers, James Y.
413. Miller, Gary L.
414. Miller, Harlan L., Jr.
415. Milliken, John L., Jr.
416. Miltner, John H.

417. Misevic, Bruno V.
418. Moeller, Terry J.
419. Mongold, Joe W.
420. Monroe, Robert S.
421. Moody, J.D.
422. Moore, Arthur A.
423. Moore, Edward L.
424. Morrison, Alexander J.
425. Mosdale, Kent B.
426. Moyer, Gilbert, Jr.
427. Mrak, John R.
428. Mueller, Rodney A.
429. Muesegaes, Fred G.
430. Mullan, Brian F.
431. Mullen, David D.
432. Mullin, Michael
433. Mumford, Richard
434. Munton, James W.
435. Murphy, James C.
436. Myli, Howard O.
437. Nagy, Steve B.
438. Neff, Evan A.
439. Nelson, Jack L.
440. Nelson, Ronald L.
441. Nevitt, James E.
442. Newlon, Gene W.
443. Nichols, Peter D.
444. Nielson, Frederick P.
445. Nilsson, Mervin
446. Norstrom, John S.
447. Norton, Lynn M.
448. Oberg, Seth M.
449. O'Brien, Jerold
450. O'Brien, Martin J.
451. O'Dell, Thomas M.
452. O'Gara, Michael L.
453. Olbright, Lawrence D.
454. Onion, Brad

455. Orgera, Winthrop B.
456. Osburn, S.R.
457. Paciolla, Anthony F.
458. Pack, David E.
459. Palmer, William Ware, III
460. Pankratz, Richard L.
461. Patton, Hersch
462. Paulsen, Paul E.
463. Pedrazzini, Donald J.
464. Peel, Dale F.
465. Penrose, Michael P.
466. Peri, Edward L.
467. Peterman, Joseph A.
468. Peters, Gordon E.
469. Peterson, Larry W.
470. Pfister, Henry C., Jr.
471. Picard, Robert D.
472. Pierce, Louis R.
473. Pierce, Richard S.
474. Pierce, Robert A.
475. Piland, Ray G.
476. Pittman, James R.
477. Plummer, David A.
478. Poland, Peter A.
479. Pollak, James E.
480. Pollock, Robert D., Jr.
481. Poplet, Keith R.
482. Poschwatta, Carl L.
483. Poste, James D.
484. Potter, Gerald G.
485. Potter, Harold R.
486. Poust, Charles E.
487. Powell, Leo V., III
488. Prentke, Lawrence A.
489. Primich, Charles G.
490. Prosch, Thomas J.
491. Quilter, Charles John, II
492. Rajala, Orlin John

493. Rand, William C.
494. Ransford, Dale E.
495. Ray, R.E.
496. Reaume, Ronald R.
497. Rector, John C.
498. Reed, David L.
499. Reed, Gary L.
500. Reed, Peter T.
501. Rees, Paul J.
502. Reinhard, David J.
503. Rhoades, C.A.
504. Rhymers, Craig A.
505. Rich, Ronald P.
506. Richardson, Harold J.
507. Richardson, Terril J.
508. Rinderknecht, Ronald T.
509. Rinehart, Terry L.
510. Roberson, Floyd
511. Robertson, Wesley L., III
512. Robinson, Charles E., Jr.
513. Rockness, Norman P.
514. Rogers, Gordon G.
515. Rosenberg, Stephen M.
516. Ross, M.E.
517. Rottschafer, Gerald Jay
518. Roy, Allan H.
519. Royall, Michael B.
520. Rozema, Melvin A.
521. Ruminer, William L.
522. Rusher, Robert C.
523. Salz, Les
524. Saner, Carl M.
525. Saporito, J.N.
526. Sapp, Dennis J.
527. Scanlon, James P.
528. Schachle, P.J.
529. Scheinblum, Robert P.
530. Schmid, Robert

531. Schmutte, Gene
532. Schultz, Fred N.
533. Schwartz, James L.
534. Scott, Charles A.
535. Scott, R.D.
536. Scott, Roland B., Jr.
537. Seim, Raymond L.
538. Sellards, Robert L.
539. Seward, Scott B.
540. Shackelford, Kenneth L.
541. Sharp, Harry G.
542. Sheldon, Geoffrey H.
543. Shepperd, Robert K.
544. Sherman, Charles Arthur, Jr.
545. Sherman, Craig A.
546. Shurtleff, Bruce K.
547. Sievers, Richard B.
548. Simpson, William A.
549. Sledge, L.F.
550. Sluyter, V.C.
551. Smith, D.F.
552. Smith, Daniel E.
553. Smith, Gary P.
554. Smith, Lawrence D.
555. Smith, Robert E.
556. Snider, William F.
557. Snipes, Tom
558. Sordi, Roy J.
559. Sork, Mark P.
560. Speth, Stephen A.
561. Spielman, Robert W.
562. Sponhauer, Richard G.
563. Sprenkle, John H.
564. Stamps, Jerry L.
565. Starkey, J. Paul
566. Stayton, Van A.
567. Stears, Thomas M.
568. Stedfield, William C.

569. Steele, Kenneth R.
570. Stefferud, Christian D.
571. Stewart, Duncan M.
572. Sticka, Dale A.
573. Stokes, Howard Warner
574. Stuppy, Laurence J., II
575. Sublett, Gail Wm.
576. Swanson, John E.
577. Takabayashi, Glenn
578. Takoushian, Allan
579. Taylor, Curtis A.
580. Taylor, Gene
581. Taylor, J.B.
582. Tebay, Richard D.
583. Tekrony, Kent D.
584. Thomas, Frank G.
585. Thomas, Jack E.
586. Thompson, Gary N.
587. Thompson, Robert L.
588. Thorn, Donald L.
589. Thornburgh, Jon
590. Thornbury, David W.
591. Tichacek, Rich F.
592. Tidwell, James A.
593. Tieken, Robert
594. Timmons, Clifford E.
595. Tugaw, Leslie
596. Tuthill, Timothy A.
597. Twaddle, Robert R.
598. Tynan, Martin F.
599. Uhlenhop, Michael H.
600. Urdahl, Richard O.
601. Utter, David E.
602. Valadez, Ernesto E.
603. Valenzuela, John M.
604. Van Dyke, Richard E.
605. Veon, Roger
606. Vincenz, Gary

607. Wadsley, Victor J.
608. Wait, Dwight R.
609. Wakefield, Anthony L.
610. Walker, Gary D.
611. Walker, Valerie J.
612. Wall, David R.
613. Wallintner, Thomas M.
614. Walton, Michael J.
615. Warburton, James M.
616. Warner, Robert W.
617. Wascher, Vernon E.
618. Watson, Michael D.
619. Watson, Thomas D.
620. Weatherly, James G.
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No. 89-1119

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

PATRICK A. HERRING, JR., et al.,
*Petitioners,*
*vs.*
DELTA AIR LINES, INC., and
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Where Labor Protective Provisions, which were provided by Delta Air Lines in connection with Delta's merger with Western Air Lines, provide that seniority lists are to be integrated by agreement between Delta and the representatives of the affected employees, with arbitration authorized "by either party" "in the event of failure to agree"; and where a seniority agreement was reached between Delta and the authorized representatives of both the Delta and Western pilots; do individual pilots have the right to institute arbitration proceedings seeking to set aside the agreement and rewrite the seniority list?

## LIST OF PARTIES

The petitioners are the pilots listed on pages 27a-44a of the Appendix to the Petition.

The respondents are Delta Air Lines, Inc.* and the Air Line Pilots Association, International.

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* Pursuant to Rule 28 of the Rules of this Court, the following is a listing of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Delta Air Lines, Inc.: Atlantic Southeast Airlines, Inc.; Comair, Inc.; Gatwick Handling, Ltd.; SkyWest, Inc.; and WORLDSPAN, L.P.

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No. 89-1119

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

PATRICK A. HERRING, JR., et al.,
*Petitioners,*
*vs.*
DELTA AIR LINES, INC., and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
*Respondents.*

---

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

The petition for certiorari seeks to escape a well-established interpretation of Labor Protective Provisions ("LPPs") provided by Delta Air Lines, Inc. ("Delta") in its merger agreement with Western Air Lines, Inc. ("Western"). Although petitioners seek to elevate the significance of this case by asserting that it involves important policy considerations under both the Railway Labor Act (RLA) and the Federal Arbitration Act, in fact it involves nothing more than affirming long-established principles as to whether Sections 3 and 13 of the LPPs require arbitration under a particular set of facts. Given

that the decisions of both the district court and the Ninth Circuit correctly interpreted these sections consistent with those principles, certiorari would serve no useful or appropriate purpose and should be denied.

The LPPs upon which petitioners attempt to rely are a special set of provisions to protect employees in a merger. Among other things, the LPPs, which were standardized by the Civil Aeronautics Board (CAB) in the *Allegheny-Mohawk Merger Case*, 59 CAB 22 (1972), require that provisions be made for integrating the seniority lists of the two merging carriers in a fair and equitable manner. Specifically, Section 3 of the LPPs provides:

> Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, *agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13.* [emphasis added].

Section 13 of the LPPs sets forth the *procedure* for conducting arbitration.

Inasmuch as both Western's and Delta's pilots were represented by the Air Line Pilots Association (ALPA), the two pilot groups, pursuant to ALPA's Merger Policies, elected merger committees to act as their representatives in an attempt to negotiate a single seniority list which they would request Delta to accept. Because Delta's collective bargaining agreement with ALPA gave

Delta the right to approve the integration of the seniority lists[1], and because Section 3 of the LPPs contemplates carrier involvement, Delta representatives met with the merger committees on a number of occasions to inform the committees of Delta's views and to assist the committees in reaching an agreement that all parties could accept as fair and equitable. During this process, Delta consistently stated that the list must be fair to both sides and that neither group should receive a windfall at the expense of the other.

On May 28, 1987, the Delta and Western pilots merger committees reached agreement on an integrated list and Delta signed an agreement accepting the list. Petitioners contend that the list is not fair and equitable to the former Western pilots primarily because date-of-hire was not the principal basis for integrating the two groups, and because "equipment ratios" was a primary element establishing the list.[2] In fact, many different kinds of integration methods have been used and upheld as fair and equitable by the CAB, arbitrators and courts.

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[1] Section 1.B.3.b of the 1986-1989 collective bargaining agreement between Delta and ALPA provides that in the event Delta acquires another airline: "The integration of the seniority lists of the two pilot groups shall be subject to approval by the Company."

[2] The term "equipment ratios" refers to a system designed to assure that no pilot would suffer a decline in earnings or flight status as a result of the merger, and that all pilots would share equitably in the post-merger growth of the airline. Since pilot earnings are based both on the position a pilot holds (captain, first officer, second officer) and the size of the aircraft (or "equipment") a pilot operates, the "equipment ratio" seniority integration system was designed so that a pilot who, for example, had sufficient seniority to hold a B-727 captain position prior to the merger would not be "bumped" from that position as a result of the merger. Thus, the seniority list was structured in groupings related to the number and type of pilot positions brought to the merged airline by each pilot group.

Various factors besides mere length of service and date of hire have been utilized and permitted in order to preserve each group's relative premerger rights and equities, and in order to insure that any gains and losses as a result of the merger are distributed equitably throughout the merged list. *Northeast Master Exec. Council v. CAB*, 506 F.2d 97, 104-05 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975).

Petitioners' attempt to reform the integrated seniority list through arbitration suffers from three fatal flaws. First, in order to compel arbitration under the RLA or Federal Arbitration Act, there must be an underlying agreement to arbitrate. The Ninth Circuit correctly ruled that the particular agreement relied upon by petitioners — Sections 3 and 13 of the LPPs — does not provide a basis for arbitration when, as here, the surviving carrier and the employees' collective bargaining representative reach agreement on seniority integration.

Second, to allow arbitration after a collectively bargained agreement has been reached between authorized union representatives and an employer would be contrary to nearly 50 years of this Court's precedent. National labor policy places in the collective bargaining representative's hands the *exclusive* authority to bargain on behalf of and bind the entire bargaining unit. Petitioners' attempt to abrogate the seniority integration agreement between ALPA and Delta runs counter to this policy and is not supported by RLA, Federal Arbitration Act or CAB precedent.

Third, by ruling that ALPA did not breach its duty of fair representation in its negotiating and entering into the seniority integration agreement, the Ninth Circuit eliminated the only possible basis for challenging that agreement. Indeed, the lower court relied upon well-established authority in holding that the inevitable

dissatisfaction on the part of some employees with the results of the seniority integration process does *not* support a finding of a breach of this duty. Moreover, given that this aspect of petitioners' case involves unique facts, *e.g.*, allegations that the pilot representatives were "coerced" by Delta and that various ALPA merger policies were not followed, the assertion that the Ninth Circuit erred in deciding this issue is an inadequate reason for granting certiorari.

## REASONS FOR DENYING THE WRIT

### I. THE PETITIONERS' ARBITRATION REQUEST WAS PROPERLY DENIED INASMUCH AS THERE WAS NO SPECIFIC AGREEMENT TO ARBITRATE

It is well-settled that "[a]rbitration is a matter of contract and a party cannot be required to submit any dispute which he has not agreed to so submit." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). Here, petitioners' request for arbitration is based on Sections 3 and 13 of the LPPs. Yet nowhere in those sections — or anywhere else for that matter — is there any provision establishing the right of individual pilots to compel arbitration in order to abrogate or rewrite a seniority list integration agreement negotiated by the pilots' representatives.

Section 3 of the LPPs provides for "agreement [regarding the merger of seniority lists] through *collective bargaining between the carriers and the representatives of the employees affected.*" [emphasis added]. That language plainly refers to Delta as the "carrier" (inasmuch as Western ceased to exist after the merger), and the designated ALPA representatives as "representa-

tives of the employees" since ALPA had represented both the Delta and Western pilots prior to the merger. Because the next sentence in Section 3, providing for arbitration "*by either party*" "*in the event of failure to agree*" [emphasis added], refers to what will occur if the *carrier* and *representative* do not agree on a merged seniority list, the Ninth Circuit correctly held that Delta and ALPA are the only "parties" under Section 3, that only they can trigger the arbitration process under the LPPs, and that arbitration can occur only if they fail to reach an agreement. (Pet. 4a)

Petitioners' characterization of the Ninth Circuit's decision as "thwart[ing] the strong federal policy of enforcing agreements to arbitrate" is grossly misleading. (Pet. 7) Likewise misleading is the assertion that the "lower court's decision has created a large loophole in the federal arbitration scheme where an employee's [*sic*] promise to arbitrate airline-merger related labor disputes is not enforceable." (*Id.* p. 8) In fact, the Ninth Circuit merely confirmed that there is no right to arbitrate under Section 3 of the LPPs when the collective bargaining representative of the affected employees and the surviving carrier agree on seniority integration. Rather than making any sweeping pronouncement regarding the enforceability of arbitration provisions in airline mergers, the lower court reviewed the language of Section 3 — the linchpin of petitioners' arbitration claims — and ruled that it did not provide a basis for arbitration when the carrier and union reach an agreement.

Contrary to petitioners' arguments, the holding that there is no right to arbitrate when the union and carrier agree on seniority integration is entirely consistent with both CAB and court decisions. For example, in *Pan American-Acquisition of, Control of and Merger with National*, CAB Order 82-4-75 (1982), the CAB said "We

have long held that, pursuant to Section 3, the surviving carrier of an acquisition or merger and the affected employees (*by their representatives in terms of the Railway Labor Act if they are organized*) are responsible for integrating seniority lists. *Only when the carrier and the employees' representatives disagree on seniority, do we intrude, by insuring that the parties arbitrate.*" [emphasis added] (p. 2).

Moreover, once there is an agreement between the collective bargaining representative and the carrier, that agreement will not be set aside absent a showing of bad faith or a breach of the duty of fair representation. *Delta - C&S Seniority List*, 29 CAB 1347 (1959), *aff'd sub nom. Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960). This rule ensures stability in labor relations since, as the CAB has pointed out, any other holding would mean that

> carriers and airline unions could not rely on the validity of seniority lists put forth by designated employee representatives for purposes of collective bargaining. *That state of affairs would not be in the public interest.* [emphasis added].

*Delta-Northeast Merger Case*, CAB Order 73-1-24 at p. 5 (1973), *aff'd sub nom. Northeast Master Exec. Council v. CAB*, 506 F.2d 97 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975).

Indeed, petitioners' suggestion (Pet. 9) that the national labor policy calling for the peaceful and prompt resolution of labor issues would be served by overriding a collectively bargained agreement is absurd. Collective bargaining is premised on a group of employees delegating their power to deal with their employer to an author-

ized representative. If an agreement reached through collective bargaining was subject to arbitral review whenever some of the employees disagreed with it, then no negotiated agreement could survive. Such a result would be directly contrary to over 60 years of national labor policy.[3]

## II. THE DENIAL OF PETITIONERS' ARBITRATION REQUEST UNDER THE LPPs WAS ENTIRELY CONSISTENT WITH ESTABLISHED RLA PRECEDENT

### A. The RLA Does Not Permit Arbitration in This Case

Petitioners' argument (Pet. 11-13) that the RLA imposes upon Delta a duty to arbitrate the seniority list integration under the LPPs demonstrates a fundamental misunderstanding of both the RLA and the LPPs. Ordering arbitration for the purpose of abrogating or rewriting the integrated seniority list agreed to in collective bargaining would violate what petitioners agree is the "heart" of the RLA — the duty to "make and maintain contracts." It is well settled that individual members of a collective bargaining unit do not have the right to negotiate separate agreements or obtain separate rights when such agreements or rights are inconsistent with the collective bargaining agreement or would circumvent the

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[3] The delay caused by arbitration of seniority integration disputes is well documented. If such a proceeding had occurred here, then it likely would have taken one or two years to complete. Thus, instead of having in place a collectively bargained seniority list in 1987, the parties might have had to wait until 1989 to know where they stood.

authority of the collective bargaining representative. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944); *Hendricks v. Air Line Pilots Assn.*, 696 F.2d 673 (9th Cir. 1983). As this Court has stated:

> *The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees* with terms which reflect the strength and bargaining power and serve the welfare of the group. [emphasis added].

*J.I. Case Co. v. NLRB, supra*, 321 U.S. at 338.

Because a collective bargaining representative has the exclusive power to bind *all* employees in a collective bargaining unit, and since employees are prohibited from entering into individual contracts that are contrary to the collective bargaining agreement, a carrier and a collective bargaining representative cannot be required by a purported contract between the carrier and groups of employees to arbitrate an issue which has already been resolved in the collective bargaining agreement. Yet this is exactly the relief that petitioners seek here. They contend that they are third-party beneficiaries to the contract between Delta and Western which provided for the LPPs, and that under the LPPs they — as individuals — are entitled to compel arbitration even though the collective bargaining agreement between ALPA and Delta settles the very issue they seek to arbitrate. Simply put, the arbitration they seek would necessarily abrogate the collectively bargained seniority integration agreement which, under the RLA, both ALPA and Delta are required to maintain. Nothing could be more repugnant to the "heart" of the RLA.

Moreover, by reaching agreement on seniority integration, Delta and ALPA complied with both the RLA (by making and maintaining a collective bargaining agreement with respect to seniority integration) and with the LPPs (by collectively bargaining the integration of seniority of the two merging pilot groups pursuant to Section 3). If the LPPs were inconsistent with the RLA, *i.e.*, if they were interpreted to require the abrogation of a collective bargaining agreement entered into pursuant to the RLA, then they plainly would not be enforceable under the RLA. The LPPs are not, however, inconsistent with the RLA. Rather, they provide for integration of seniority lists through collective bargaining where the employees are represented by a union, and arbitration only when there is no agreement between the carrier and union. *Delta - C&S Seniority List, supra*, 29 CAB 1347, 1349.

Petitioners' reliance on cases in which courts have ordered arbitrations under the LPPs is misleading. (Pet. 11-14) Those cases involve disputes between a carrier and a group of employees *not* represented by an authorized collective bargaining representative. Thus, in *Delta Air Lines, Inc. v. CAB*, 574 F.2d 546 (D.C. Cir.), *cert. denied*, 404 U.S. 1015 (1972), Delta did not dispute the right of the dissatisfied flight attendants to seek arbitration under the LPPs since, in contrast to the case at hand, they were *not* represented by an authorized collective bargaining representative, and there had been no agreement.

Likewise, the RLA never has been interpreted to require arbitration of every dispute that supposedly relates to LPPs. Contrary to petitioners' assertion (Pet. 12-13), RLA Sections 151a and 152 First and Second do not require the carrier and collective bargaining representative to resolve *any* dispute that might arise, but

instead are limited to compelling prompt resolution of disputes *arising out* of a collective bargaining agreement. As established in *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R. Co.*, 229 F.2d 926, 929 (7th Cir. 1956), *aff'd*, 353 U.S. 30, *reh'g denied*, 353 U.S. 948 (1957), these provisions contemplate "the existence of a collective agreement already concluded," and disputes which relate to either the meaning or proper application of a particular provision in such an agreement.

### B. The Ninth Circuit Properly Rejected Petitioners' Breach of Duty of Fair Representation Claim

Petitioners' argument that the Ninth Circuit failed to consider fully their duty of fair representation claim (Pet. 14-16) raises no issue that warrants review by this Court. Petitioners fail to point to any error of law in the lower court's opinion, instead rearguing the same facts that led the Ninth Circuit to conclude that there was no evidence that ALPA breached its duty of fair representation particularly since "[t]he courts allow a union a 'wide range of reasonableness' in the conduct of the representation of its members." (Pet. 6a) This Court has held on a number of occasions that a collective bargaining representative does not violate its duty of fair representation in negotiating a seniority list which has adverse affects on some of its members:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of

> such differences does not make them invalid. *The complete satisfaction of all who are represented is hardly to be expected.* [emphasis added].

*Ford Motor Co. v. Huffman*, 345 U.S. 330, 333 (1953). *See also Humphrey v. Moore*, 375 U.S. 335, 349, *reh'g denied*, 376 U.S. 935 (1964) ("We are not ready to find a breach of the [union's] duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against another.")

Here, petitioners' duty of fair representation claim is based on a wide range of allegations, including assertions that the Western pilot representatives were intimidated by Delta, that various ALPA merger policies were not followed, and that ALPA's president acted improperly in the seniority integration process. In considering these allegations, the lower court ruled that the petitioners' "unsupported statements . . . provide no concrete evidence that ALPA breached the duty of fair representation." (Pet. 6a) In seeking certiorari, petitioners are asking this Court to review the same facts which were carefully considered and found wanting by both the district court and the Ninth Circuit.

In short, given (1) the unique set of facts surrounding the duty of fair representation claim, and (2) petitioners' inability to suggest anything more than the lower court's failure to consider fully these facts, there is no reason to grant certiorari on this basis.

## III. THE NINTH CIRCUIT'S DECISION DOES NOT CREATE A CONFLICT IN THE CIRCUITS CONCERNING FEDERAL ARBITRATION ACT ENFORCEMENT PROVISIONS

Petitioners' final effort to create a basis for granting the writ is their assertion that the Ninth Circuit's opinion causes a conflict in the circuits with respect to the scope of the Federal Arbitration Act's enforcement provisions. (Pet. 16-17) Petitioners' argument is premised on their speculation that the Ninth Circuit's statement, that the Federal Arbitration Act requires "a written agreement between the parties to arbitrate" (Pet. 5a), means that the court refused to enforce the LPPs because the Western pilots were not parties to the merger agreement.

In fact, nothing in the lower court's opinion supports this speculation. The opinion does not discuss this purported issue, nor is there any reason to assume that the Ninth Circuit's holding means anything other than arbitration will not be ordered when there is no agreement to arbitrate. Of course, under Section 3 of the LPPs there was no basis for arbitration once Delta and ALPA reached a seniority integration agreement.[4]

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[4] Similarly, the absence of an agreement requiring arbitration undercuts petitioners' assertion (Pet. 16) that the lower court erred in applying the "contracts of employment" exclusion of Section 1 of the Federal Arbitration Act. Without an agreement to arbitrate, the Federal Arbitration Act has no application to this case.

## CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

DATED: February 14, 1990

Respectfully submitted,

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v.

DELTA AIR LINES INC. and
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

---

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## QUESTION PRESENTED

Whether individual airline pilots whose seniority rights following a merger were negotiated in good faith on their behalf by their union committee which was composed of fellow employees from their own pre-merger seniority list and which was selected according to established union procedure, can compel their union to set aside the resulting collective bargaining agreement and submit the seniority terms to be rewritten by an outside arbitrator.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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No. 89-1119

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PATRICK A. HERRING, JR., *et al.*,
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v.

DELTA AIR LINES INC. and
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

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### OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit originally issued an unpublished memorandum decision, which is reprinted in Petitioner's Appendix ("P.A.") at 1a. The Court of Appeals later modified its original decision and redesignated it a published opinion. The published opinion, filed January 23, 1990, is reprinted in Respondent's Appendix ("R.A.") at 1a.

The unreported memorandum of decision and order of the United States District Court for the Central District of California (Kelleher, D.J.), filed May 11, 1988, is reprinted at P.A. 9a.

## STATEMENT OF THE CASE

In 1986, respondent Delta Air Lines, Inc., ("Delta"), and Western Airlines, Inc. ("Western") agreed to merge. At the time, ALPA was the duly authorized collective bargaining representative under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, of the pilots employed by both Delta and Western.

As part of the merger agreement, Delta agreed with Western that it would adopt certain labor protective provisions ("LPPs"). Section 3 of the LPPs required that Delta reach an agreement with ALPA to integrate the seniority lists of the Delta pilots and the Western pilots. (R.A. 10a) Section 3 further provided that if Delta and ALPA failed to agree on seniority integration, they could submit the matter to an arbitrator. Section 13 of the LPPs set forth the applicable arbitration procedure. (*Id.*)

As noted by the Court of Appeals, "[t]he integration of a seniority list involves much more than listing pilots according to the date that each began work." (R.A. 3a). To deal with these complexities, ALPA has a formal and detailed set of guidelines, known as the ALPA Merger Policies, concerning the integration of the seniority lists of pilot groups it represents. These guidelines have been in effect at all times relevant to this case. The cornerstone of the ALPA Merger Policies has been to vest the authority to determine an appropriate method of integration in Merger Committees which consist of pilots who are selected directly from the affected pilot groups. (R.A. 8a-9a). The Merger Committee for each airline's pilots is elected by the pilot group's Master Executive Council

("MEC"), the highest governing ALPA body for an airline. The ALPA MEC for each airline is elected by the pilots of that airline.

ALPA Merger Policies vest in the Merger Committees "complete and full authority to act for and in behalf of the flight deck operating crew members of their respective airlines for the purpose of compiling a single flight deck operating crew member seniority list." ALPA's national officers do not have authority to determine and impose an appropriate method of seniority integration. Furthermore, ALPA's Merger Policies provide that the Merger Committees of the affected pilot groups will not proceed to arbitration under the Merger Policies unless they cannot agree on a method of integrating their seniority lists.

After Delta announced its merger with Western, Merger Committees for the Delta pilots and for the Western pilots ("Delta Merger Committee" and "Western Merger Committee," respectively) were elected by their respective MECs to negotiate a method of integrating the seniority lists. On May 28, 1987, following negotiating meetings with each other and with Delta, the Delta Merger Committee and the Western Merger Committee reached an agreement which integrated the seniority lists. The Western Merger Committee was satisfied that it had reached an agreement which was fair and equitable and in the best interests of the Western pilots. The May 28, 1987 agreement was executed by the Delta Merger Committee, the Western Merger Committee, and Delta; no national-level ALPA officer executed the agreement. Under ALPA's Merger Policies, ALPA had a duty to support the agreement reached by the Merger Committees. Therefore, on September 21, 1987, ALPA signed a supplemental collective bargaining agreement with Delta which incorporated the integrated seniority list.

The integrated seniority list which was incorporated into the collective bargaining agreement represented a

compromise between the opening positions of the Western Merger Committee and the Delta Merger Committee. Originally, the negotiators for the Western pilots proposed integrating the seniority lists based simply on the pilots' dates of hire. The negotiators for the Delta pilots originally proposed to integrate the seniority lists based on ratios of cockpit positions (*e.g.*, B-727 captain positions). The Delta Merger Committee also proposed that in determining these ratios, pre-merger Delta pilots be credited for all of Delta's planned fleet expansion through 1992. As a compromise, the negotiating teams agreed to base seniority on ratios but to permit both of the pilot groups to share fully in all of Delta's planned fleet expansion. The agreement also contained "conditions and restrictions" that provided significant protections to pre-merger Western pilots.

Petitioners, a group of former Western pilots who were dissatisfied with the results of the seniority list negotiations, demanded that Delta and ALPA set aside the May 28, 1987 agreement and permit an arbitrator to rewrite the seniority agreement. After Delta and ALPA refused, petitioners, in August 1987, sued Delta and ALPA in the United States District Court for the Central District of California, seeking to force the defendants to permit an arbitrator to revise the seniority agreement more to petitioners' liking. In their complaint, petitioners alleged that defendants, by refusing to submit the matter to arbitration, violated the LPP's, the RLA, the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), and the common law of contracts. The complaint also alleged that in negotiating the new collective bargaining agreement ALPA breached its duty of fair representation under the RLA.

In a memorandum of decision and order filed May 11, 1988, the district court granted defendants' motions for summary judgment. (*See* P.A. 9a). The court held that petitioners had no right to set aside the seniority agree-

ment or to require ALPA and Delta to permit an arbitrator to rewrite the agreement. The court also rejected petitioners' claim that ALPA breached its duty of fair representation, (P.A. 16a-17a), finding that this claim was based on "unsupported statements" in petitioners' "memorandum." (P.A. 16a).

The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision. The Court of Appeals initially issued an unpublished memorandum decision, (*see* P.A. 1a), which it later modified in minor ways and published as an opinion (*see* R.A. 1a). Like the district court, the Court of Appeals held that Delta and ALPA clearly did not violate the LPPs, the RLA, the FAA or contract law by refusing to submit to arbitration the matter of integrating the seniority lists. The court also held that ALPA acted reasonably in reaching the new collective bargaining agreement and did not breach its duty of fair representation.

## SUMMARY OF ARGUMENT

The Court of Appeals' decision did not offend the federal policy or RLA provisions favoring arbitration because petitioners clearly had no right under the LPPs to require Delta or ALPA to submit to arbitration the integration of the seniority lists. Delta and ALPA were the only parties with the right to seek arbitration under the LPPs and they reached agreement on integrating the seniority lists. Moreover, no issue is presented concerning ALPA's duty of fair representation, since petitioners' argument was, in the court's view, based "on only unsupported statements" which were "insufficient to survive the ALPA's summary judgment motion." (R.A. 6a)

## REASONS WHY THE WRIT SHOULD NOT BE GRANTED

### I. THIS CASE PRESENTS NO IMPORTANT ISSUES OF FEDERAL LAW SINCE PETITIONERS' CLAIM THAT THEY HAD A RIGHT TO REQUIRE DELTA AND ALPA TO SUBMIT THE INTEGRATION OF THE SENIORITY LISTS TO ARBITRATION IS CLEARLY WITHOUT MERIT

Petitioners argue that the Court of Appeals' decision presents an important question of federal law because, petitioners assert, the decision was contrary to federal policy favoring arbitration. Petitioners' argument is baseless. The Court of Appeals correctly held that petitioners clearly had no right to require Delta and ALPA to submit the integration of the seniority lists to arbitration.

Section 3 of the LPPs states that if the carrier and the employees' representative fail to agree on a method for integrating the seniority lists, "the dispute may be submitted by *either party* for adjustment in accordance with section 13." (R.A. 10a (emphasis added)). It is clear from the words "either party" that the LPPs were intended to give only the carrier or the union the right to submit disputes under section 3 to arbitration. This self-evident interpretation of the LPPs is confirmed by the interpretation of the Civil Aeronautics Board ("CAB"), the government agency formerly responsible for imposing and interpreting LPPs. The CAB held that the standard LPP provision on seniority integration disputes, such as the one at issue here, gave only the carrier and the union the right to submit such disputes to arbitration. *See, e.g., Pan American-National*, Order No. 82-4-75, slip op. at 2 (CAB April 15, 1982) ("Only when the carrier and the employees' representatives disagree on seniority do we intrude, by ensuring that the parties arbitrate").

Here the two Merger Committees and Delta reached an agreement on how to integrate the seniority list.

(R.A. 3a). No dispute exists between ALPA and Delta on this matter. Since section 3 of the LPPs gives only the carrier and the union the right to submit a dispute to arbitration, petitioners clearly had no right to have the matter submitted to arbitration.

Similarly frivolous is petitioners' claim that the ALPA-Delta agreement was void because it was the result of coercion by the carrier. Uncontested evidence in the record established that the Western Merger Committee agreed to the method for integrating the seniority lists incorporated in the May 28, 1987 agreement not because it felt threatened but because it believed that the terms of the agreement were preferable to the possible result of arbitration. Moreover, to the extent that Delta made statements during the negotiations regarding its economic power, such statements were entirely appropriate to the negotiating process. As the district court aptly pointed out:

> [T]he courts have long recognized that, in the context of collective bargaining, economic threats to gain concessions at the bargaining table are entirely lawful. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). It is well settled law that the process of labor negotiations is fundamentally one of "compromise and economic pressure." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 336 (1981).

(P.A. 14a).[1]

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[1] Grasping for straws, petitioners argue that Delta's statements during negotiations were inappropriate because, according to petitioners, the Western Merger Committee was not engaged in collective bargaining and because the Western Merger Committee lacked any power to resist Delta's demands. Contrary to petitioners' assertion, the Western Merger Committee was indeed engaged in collective bargaining, pursuant to the ALPA Merger Policies. This collective bargaining culminated in a signed agreement—the May 28, 1987 agreement—to which the Western Merger Committee was a party. Nor was the Western Merger Committee powerless to resist Delta's demands. If the Western Merger Committee was dissatis-

Since petitioners clearly had no right to submit the integration of the seniority lists to arbitration, the Court of Appeals' decision does not offend federal policy favoring arbitration. Petitioners point out that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Here, however, where there is no agreement to arbitrate after the parties reached agreement on the merits, there is *no doubt* that petitioners' dissatisfaction with the results of the negotiations did not give them the right to have an arbitrator rewrite the results.[2]

Moreover, petitioners' argument that RLA § 152, First, 45 U.S.C. § 152, First, entitled them to arbitration is also erroneous. The law is clear that federal courts may not recognize disputes between individual employees and carriers when, as in this case, the employees' union has an agreement with the carrier on the matter the employees dispute. *See Hendricks v. Airline Pilots Ass'n Int'l*, 696 F.2d 673, 675-77 (9th Cir. 1983); *see also Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 728 (1945); *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 347 (1944).

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fied with the proposals offered by Delta or the Delta Merger Committee, it could have simply declined to agree to the proposals and proceeded to arbitration pursuant to the ALPA Merger Policies. (R.A. 4a, 8a-9a).

[2] The fact that the federal government no longer imposes and enforces LPPs adds no merit to petitioners' case. Simply because petitioners cannot address their frivolous claims to a government agency, it does not follow that a court must give the claims more consideration than they otherwise warrant.

## II. THE COURT OF APPEALS FOUND THAT PETITIONERS' DUTY OF FAIR REPRESENTATION CLAIM WAS UNSUPPORTED BY ANY EVIDENCE

As part of their effort to undermine the validity of the seniority integration agreement, petitioners claimed below that ALPA violated its duty of fair representation ("DFR") towards them. Now petitioners argue that the Court of Appeals did not address their DFR claim. (Pet. at 16). However, the Court of Appeals held that petitioners' DFR claim was based on "only unsupported statements that provide no concrete evidence that ALPA breached the duty of fair representation." (R.A. 6a). The opinion continued:

> These statements are insufficient to survive the ALPA's summary judgment motion. The courts allow a union a "wide range of reasonableness" in the conduct of its representation of its members. It must be able to focus on the needs of its whole membership without undue fear of law suits from individual members. *Bautista v. Pan American World Airways*, 828 F.2d 546, 549 (9th Cir. 1987). The integration of a seniority list is a difficult undertaking because of the inevitability that some individual employees will be disadvantaged in comparison to others. In these circumstances, a union does not breach its duty of fair representation to others as long as it proceeds on some reasoned basis. *Clayton v. Republic Airlines*, 716 F.2d 729 (9th Cir. 1983). Therefore, the district court correctly granted summary judgment to ALPA on this issue.

(R.A. 6a).

The court also rejected petitioners' claim that "ALPA did not follow its own internal procedures for merging the seniority lists." (Pet. at 16). In this respect, the court found, contrary to petitioners' argument,

> ALPA's merger policies vests (sic) authority to determine an appropriate method of integration in

> Merger Committees consisting of pilots selected from the affected pilot groups. In this case the pilots representing Western and Delta reached an agreement on seniority issues. . . . The agreement was integrated into the Delta-ALPA collective bargaining agreement.

(R.A. 2a-3a). There is no basis for review of the court's ruling that ALPA satisfied its duty of fair representation.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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# APPENDIX

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**APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 88-6182

D.C. No. CV 87-5725-RJK

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PATRICK A. HERRING, JR.; RICHARD A. BREMS; JOSEPH HALEY; RONALD L. JENKINS, *et al.*,
*Plaintiffs-Appellants,*

v.

DELTA AIR LINES, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
*Defendants-Appellees.*

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ORDER AND OPINION

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Appeal from the United States District Court
for the Central District of California
Robert J. Kelleher, District Judge Presiding

Argued and Submitted
June 27, 1989—Pasadena, California

Memorandum Filed October 13, 1989
Order and Opinion Filed January 23, 1990

Before: Dorothy W. Nelson and Robert Boochever, Circuit Judge, and William D. Browning*, District Judge.

Opinion by Judge Nelson

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* Hon. William D. Browning, United States District Judge for the District of Arizona, sitting by designation.

## ORDER

The Memorandum disposition filed October 13, 1989 is hereby redesignated as an authored opinion by Judge Nelson. The opinion has been modified.

## OPINION

NELSON, Circuit Judge:

The plaintiffs-appellants, Patrick Herring and a group of Delta Airline pilots, appeal the district court's grant of summary judgment to defendants-appellees, Delta Air Lines, Inc., ("Delta") and Air Line Pilots Association, International, ("ALPA"). The plaintiffs-appellants also appeal the district court's denial of their motions to compel discovery, to strike portions of declarations, and to add more plaintiffs to their complaint. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, 1337, and 2201. The appellate court has jurisdiction pursuant to 28 U.S.C. § 1291. We review grants of summary judgment *de novo*. *Eagle v. Am. Tel. & Tel. Co.*, 769 F.2d 541, 547 (9th Cir. 1985). We review denials of motions to compel discovery and to strike portions of declarations for abuse of discretion. *Draper v. Coombs*, 792 F.2d 915, 924 (9th Cir. 1986). We review the denial of leave to amend after a responsive pleading has been filed for an abuse of discretion. *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Serv. Bureau*, 701 F.2d 1276, 1292 (9th Cir.), *cert. denied*, 464 U.S. 822 (1983).

In 1986, two airlines, Delta and Western Airlines, Inc., ("Western"), agreed to merge. As part of the merger agreement, Delta, the surviving entity, pledged to negotiate an integration of the two pilot seniority lists with ALPA, the pilots' union. Both Delta's pilots and Western's pilots were represented by ALPA. ALPA's merger policies vests authority to determine an appropriate method of integration in Merger Committees con-

sisting of pilots selected from the affected pilot groups. In this case the pilots representing Western and Delta reached an agreement on seniority issues.

Delta stated that the labor issues arising during implementation of the merger would be performed according to a system of industry practices known as labor protection provisions ("LPPs"). The integration of a seniority list involves much more than listing pilots according to the date that each began work. It encompasses such variables as the pilot's rank (*e.g.*, captain, first officer, etc.), and the kind of aircraft with which a pilot has had experience. Therefore, the allocation of employment costs and benefits created by a merger is a difficult one. After strenuous negotiations, management reached an agreement with the union. The agreement was incorporated into the Delta-ALPA collective bargaining agreement.

This agreement was acceptable to most of the pilots but was unacceptable to Herring and to a majority of the pilots who formerly had flown for Western. These pilots seek to overturn the agreement between Delta and ALPA and to send the matter to arbitration. They rest their claim on numerous grounds. The pilots allege that: 1) the appellees violated the LPPs; 2) the appellees violated the Railway Labor Act ("RLA"); 3) the appellees violated the Federal Arbitration Act ("FAA"); 4) the appellees breached a contract in which the appellants were third-party beneficiaries; and 5) ALPA did not fulfill its duty of fair representation ("DFR") to appellants. We affirm the judgments of the district court.

## DISCUSSION

### I. The Labor Protection Provisions Grounds

Originally, government regulatory agencies imposed LPPs as a condition of allowing mergers between railway systems. The LPPs served to protect the employees whose job security could be altered through a merger.

As similar consolidations occurred in the airline industry, the government standardized and imposed analogous LPPs. Following the Airline Deregulation Act of 1978, the government no longer imposed LPPs. However, the parties to a merger may adopt, as part of their agreement, these standardized provisions. In this merger, the parties voluntarily accepted these standardized provisions.

[1] Section 3 of LPPs governs the integration of seniority lists following a merger between two carriers. Section 3 provides:

> In so far as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13.

Section 3 does not provide any grounds for the appellants' argument. First, ALPA, not the appellants, is the representative of the pilots for collective bargaining purposes. Only the collective bargaining representatives (or the carrier) may submit a dispute between them over the integration of seniority lists to arbitration. Second, the pilot's representatives working on the merger agreement could have asked ALPA for an arbitrator if they could not agree. Third, the pilot representatives, however, did not request arbitration. Therefore, the LPPs provide no grounds for the appellants' action.

II. The Railway Labor Act Grounds

[2] The appellants claim that Delta and ALPA violated the RLA, 45 U.S.C. § 151a and 152 First and Second. These sections govern disputes between business organizations and labor unions that arise out of a col-

lective bargaining agreement. *Hendricks v. Airline Pilots Ass'n*, 696 F.2d 673 (9th Cir. 1983). The sections are not applicable because this case presents no dispute between Delta and ALPA. The appellants also allege that Delta engaged in intimidating and coercive behavior that violated section 152 Third. This section provides that employees have a right to select a collective bargaining representative without "interference, influence, or coercion" from the carrier. Section 152 Fourth prohibits a carrier from interfering with its employees' right to join or to refrain from joining a collective bargaining unit. ALPA is the only labor organization involved in this case and neither Delta nor ALPA attempted to influence the pilots to join or to leave ALPA or any other union. Therefore, these RLA sections cited by the appellants are inapplicable.

[3] The appellants also argue that Delta and ALPA violated the RLA by demoting Herring and that Delta violated the RLA by refusing to allow appellants to use Delta pilot mail-boxes to communicate regarding their protests. No private cause of action exists under the RLA for a group of employees who assert retaliatory conduct based upon employee activities which bear no relationship to establishing a union, or to employer activities that bear no relationship to undermining a union. *Klemens v. Air Line Pilots Ass'n, Int'l*, 736 F.2d 491, 496 (9th Cir.), *cert. denied*, 469 U.S. 1019 (1984). Therefore, these allegations, even if true, do not constitute a violation of the RLA in this situation.

III. The Federal Arbitration Grounds

Appellants also allege that the FAA, 9 U.S.C. §§ 1-14 required the appellees to arbitrate the seniority dispute. This statute is invoked only by a written agreement between the parties to arbitrate. Moreover, the statute specifically excludes from coverage "contracts of employment." Therefore, the appellants' reliance upon the FAA is misplaced.

IV. The Third Party Beneficiary Grounds

The appellants argued that they, as individual employees, are third party beneficiaries of a contract between Western and Delta to provide LPPs. Under this theory, Delta became liable to appellant when it breached the LPPs. This argument fails because Delta did not breach the LPPs, as we discussed above.

V. The Duty of Fair Representation Grounds

The appellants contend that ALPA breached its duty of fair representation ("DFR") owed to them under the RLA. They claim that the union breached this duty by acting in "hostile, arbitrary, and invidious, and discriminatory manner." The appellant base this argument on only unsupported statements that provide no concrete evidence that ALPA breached the duty of fair representation. These statements are insufficient to survive the ALPA's summary judgment motion. The courts allow a union a "wide range of reasonableness" in the conduct of its representation of its members. It must be able to focus on the needs of its whole membership without undue fear of law suits from individual members. *Bautista v. Pan American World Airways*, 828 F.2d 546, 549 (9th Cir. 1987). The integration of a seniority list is a difficult undertaking because of the inevitability that some individual employees will be disadvantaged in comparison to others. In these circumstances, a union does not breach its duty of fair representation to others as long as it proceeds on some reasoned basis. *Clayton v. Republic Airlines*, 716 F.2d 729 (9th Cir. 1983). Therefore, the district court correctly granted summary judgment to ALPA on this issue.

VI. The District Court's Exercise of Discretion on Appellants' Motions

The appellants' arguments that the district court abused its discretion when it denied appellants' motions to compel discovery, to strike portions of declarations,

and to add more plaintiffs is without merit. The records show that the appellants did not pursue discovery diligently before summary judgment. *Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1539, 1443 (9th Cir. 1986). If the portions of the ALPA declarations to which appellants objected had been stricken more than sufficient evidence remained to justify summary judgment. *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 108 S.Ct 698 (1988). The addition of more plaintiffs would have been a futile act that would not have affected the issues underlying the grant of summary judgment. *Klamath-Lake Pharmaceutical Ass'n*, 701 F.2d at 1293. Therefore, the district court did not abuse its discretion in denying appellants' motions.

CONCLUSION

We AFFIRM the judgments of the district court.

# AIR LINE PILOTS ASSOCIATION MERGER POLICIES AND RELATED EMPLOYEE PROTECTIVE PROVISIONS

DECEMBER 1985

* * * *

## MERGER POLICY BOOKLET

DECEMBER 1, 1985

* * * *

*SCOPE AND PURPOSE*

The fundamental scope and purpose of this policy is to provide protection for the employment rights of flight deck operating crew members. This policy shall be applicable when it is learned of management's intentions to effect a temporary or permanent alteration of their route structure or operations by a merger, consolidation, unification, purchase, acquisition of control, pooling or any other similar arrangement, in whole or in part, of their separate airline facilities or any of the operations or services previously performed by them thorugh [sic] separate facilities or any alteration by deletion, suspension, sale, transfer, reallocation, farm out, abandonment, dismemberment, modification or substitution of another transportation carrier's service, or the formation of an Alter Ego company which may result in the transfer, displacement or dismissal of a flight deck operating crew member or a dilution or diminution of benefits attaching to his previous employment. Any of the above acts shall hereinafter be termed "merger."

* * * *

B. *Notice of Merger*

1. Upon learning of an intent to effect changes as outlined in the Scope and Purpose paragraph of this section, or when requested by an MEC Chairman, ALPA shall make reasonable assurances that affected employees will have access to appropriate employee

protective provisions which will allow the transfer of employment and seniority from one company to another.

2. When there is mutual agreement between the requesting parties and the President that the above provisions have been met, the President shall convene a meeting between the MEC Chairman and the Merger Representatives of each airline affected under the scope of this policy into joint session and orient the participants on the provisions of this policy.

3. Each MEC shall be required to have two merger representatives at all times. These representatives shall be elected by the MEC from their respective seniority list. Each MEC may, at its option, elect one additional committee member to assist the merger representatives.

4. In the event an MEC fails to elect merger representatives within 30 days following the policy initiation date, the President may, at his discretion and subject to an opportunity for the affected MEC to be heard by him, appoint any member of ALPA in good standing from the affected airline to fill any merger representative vacancy. The MEC or the President, whoever designates these representatives, will certify them as having complete and full authority to act for and in behalf of the flight deck operating crew members of their respective airlines for the purpose of compiling a single flight deck operating crew member seniority list.

5. The President and ALPA shall take all measures as may be applicable to ensure that the flight operations, equipment and routes of each company party to a merger shall remain separated until such time as the pilot seniority lists and employment agreements are merged or until the pilot groups affected mutually agree otherwise.

## DELTA-WESTERN
## LABOR PROTECTIVE PROVISIONS

Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employes affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.

* * * *

Section 13. (a) In the event that any dispute or controversy (except as to matters arising under section 9) arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination. Unless an extension of time is agreed upon in writing by all parties, the party desiring arbitration shall give the other party or parties and the National Mediation Board written notice of the party's decision to invoke arbitration no later than 45 days after the controversy arises. The parties shall select the arbitrator from such panel alternately striking names until only ones remains, and he shall serve as arbitrator. Expedited hearings and decisions will be expected, and a decision shall be rendered within 90 days after the controversy arises, unless an extension of time is mutually agreeable to all parties. The salary and expenses of the arbitrator shall be borne equally by the carrier and (i) the organization or organizations representing the employee or employees, or (ii) if unrepresented, the employee or employees, or group or groups of employees. The decision of the arbitrator shall be final and binding on the parties.

(b) The above condition shall not apply if the parties by mutual agreement determine that an alternative method for dispute settlement or an alternative procedure for selection of an arbitrator is appropriate in their particular dispute. No party shall be excused from complying with the above condition by reason of having suggested an alternative method or procedure, unless and until that alternative method or procedure shall have been agreed to by all the parties.

FILED
FEB 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1119

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1989

---

PATRICK A. HERRING, JR., *et al.*,
*Petitioners,*

v.

DELTA AIR LINES INC. and
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITIONERS' REPLY MEMORANDUM

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

---

## PETITIONERS' REPLY MEMORANDUM

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The opposing briefs of respondents Delta Air Lines, Inc. ("Delta") and the Air Line Pilots Association, International ("ALPA") rest on four fundamental misstatements.

1. Delta and ALPA erroneously claim that the Ninth Circuit's decision below used the same standard set by 50 years of administrative and court interpretation of the LLPs. Delta admits (p. 7) that the traditional LPP standard is that "once there is an [seniority] agreement

between the collective bargaining representatives and the carrier, that agreement will not be set aside *absent a showing of bad faith or a breach of the duty of fair representation.*" *Citing Delta-C&S Seniority List*, 29 CAB 1347 (1959), *aff'd sub nom. Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960) (emphasis added). The decision below changed this well-established standard by eliminating the italicized exception. The court simply ignored appellants' claims of intimidation, coercion and other bad faith by the carrier, and ignored appellants' claim that the union breached the duty of fair representation by violating its own merger policies. Under the new Ninth Circuit standard, an agreement to arbitrate will not be enforced merely because an integrated seniority list exists, without regard to whether the list was the product of bad faith by the carrier or misconduct by the union.

2. Delta and ALPA erroneously argue that petitioners may not enforce Delta's promise to arbitrate under the plain terms of the LPPs because they were not a collective bargaining representative and, hence, did not constitute "either party" as specified in section 3 of the LPPs. This argument ignores section 13 of the LPPs which authorizes arbitration by "*any* party" for any dispute or controversy arising under the LPPs. The arbitration provision in section 3 adds to the types of disputes that may be submitted to arbitration under section 13, but it does not subtract from them. *American Airlines, Inc. v. CAB*, 445 F.2d 891 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972) (court upheld a CAB order of arbitration upon the petition of pilots who were not union representatives notwithstanding that union representatives had reached a seniority agreement with carrier). If Delta and ALPA were correct that the seniority list integration were arbitrable only where the union and company failed to agree on a "fair and equitable" list, then arbitration over the fairness of a list would not be available at all to classes or crafts of employees who were not unionized.

Delta and ALPA's argument is also inconsistent with the overall section 3 requirement that the seniority integration process be "fair and equitable." Since arbitration may be ordered upon a showing of bad faith or breach of a duty of unfair representation, employee representatives —other than union representatives—must have the right to make these bad faith allegations. Certainly, the union is not about to make bad faith allegations about itself. Also, the 660 petitioners in this case are the majority of the former Western pilots and clearly are appropriate "representatives of the employees affected" as required by section 3 for purposes of making bad faith allegations and securing arbitration if those allegations are proven. The agencies interpreting the LPPs have consistently stated that they would not consider that "representation for purposes of its labor protective provisions would necessarily be the same as the certified bargaining representative under the Railway Labor Act." *American-Trans Caribbean Merger Case*, CAB Order 71-5-30 at 3, n.6 (Docket 21828) (May 7, 1971).

3. Delta and ALPA erroneously claim that the May 28, 1987 signed seniority list was a product of collective bargaining. This misstatement permits them to argue that petitioners are seeking to upset a collective bargaining agreement in violation of national labor policy. In their briefs, neither Delta nor ALPA disputes petitioners' statement (Cert. Pet. at 15) that the two merger committees were not authorized to bargain with Delta.[1] Delta, in fact, characterizes (p. 3) its role simply as informing the two merger committees of Delta's views and in assisting the two committees to reach agreement. This is in stark contrast to its claim elsewhere that the list was the product of collective bargaining and is contrary to the

[1] With respect to the merger committee's authority, ALPA misleadingly quotes (p. 3) from its Merger Policy without making clear that the merger committees had authority only to reach agreement between themselves. As ALPA subsequently acknowledges (p. 3), an agreement with Delta could only be executed by ALPA National.

Ninth Circuit's erroneous characterization that "[a]fter strenuous negotiations, management reached an agreement with the union." (Petitioners' Appendix 3a.)

Similarly, neither ALPA nor Delta disputes petitioners' statement (p. 15) that in contrast to collective bargaining situations, the Western merger representatives had no economic leverage to resist Delta's furlough threats. The Western merger representatives, for example, were not authorized to call a strike or engage in the "major dispute" process under the Railway Labor Act. ALPA claims (p. 7, n.1) that the Western merger representatives could simply have decided not to sign the list, but this assertion begs the question of whether Delta's bad faith coercion eliminated this option.

Once it is accepted that the May 28, 1987 seniority list was not the product of collective bargaining, the legal arguments of ALPA and Delta disintegrate. Without the collective bargaining rationale, the coercion and intimidation exerted by Delta cannot be explained away or ignored (as in the decision below), the asserted sanctity of the May 28, 1987 list as a "collectively bargained" list disappears, ALPA's failure to protect the intra-ALPA negotiations from outside pressure in accordance with its own policies becomes apparent, and the reliance on collective bargaining to meet the "fair and equitable" [2] standard required by the LPPs is unavailable.

4. Delta erroneously argues that the case is unworthy of review because the court below merely applied a well-established standard to a unique set of facts. While the standard applied by the court was unique (and erroneous), the facts were not. Given the deregulation of airline mergers, it is likely that the incorporation of LPPs

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[2] Section 3 of the LPPs requires that seniority lists be integrated "in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected." (Petitioners' Appendix 25a.)

into merger agreements will be commonplace. The decision below provides an instruction manual for carriers on how to escape their LPP promise to arbitrate while dictating an unfair and inequitable seniority list which favors the pilots of the acquiring carrier. During the internal ALPA negotiations, the carrier need only threaten furloughs or other economic sanctions against a recalcitrant merger committee that has no bargaining power or authority, and incorporate the coerced seniority list into the collective bargaining agreement it subsequently signs with ALPA. This result not only is contrary to the national policy of enforcing agreements to arbitrate expressed in both the RLA and the FAA, it also invites labor strife in the national transportation industries.

Respectfully submitted,

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